

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

NO. 77-6103

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAY MARSHALL, SECRETARY OF LABOR,

Plaintiff-Appellee,

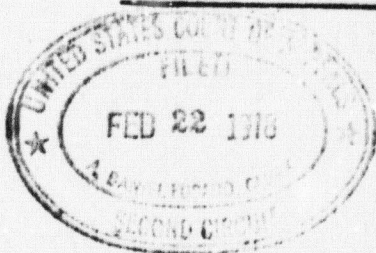
v.

NORTHWEST ORIENT AIRLINES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF LABOR



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6103

RAY MARSHALL, SECRETARY OF LABOR, ^{*}/

Plaintiff-Appellee,

v.

NORTHWEST ORIENT AIRLINES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF ISSUES PRESENTED

Whether the District Court correctly directed the United States Magistrate to reinstate the Secretary's warrant to inspect Northwest Airlines' Hangar No. 1 at JFK International Airport pursuant to the Occupational Safety and Health Act, 84. Stat. 1520, 29 U.S.C. 651 et seq.

^{*}/ Dr. Ray Marshall succeeded W. J. Usery, Jr., as Secretary of Labor on January 27, 1977. Fed. R. A. P. 43(c).

STATEMENT OF THE CASE

1. Nature of the case

This case is on appeal by Northwest Orient Airlines, Inc., ("Northwest") from an order of the District Court for the Eastern District of New York. On June 11, 1971, the District Court granted the Secretary's application for an order directing reinstatement of a warrant to inspect Northwest's Hangar No. 1 at JFK International Airport (A. 123-132).^{1/} This Court has jurisdiction under 28 U.S.C. 1291 and 1294.

2. The statutory scheme

a. This case brings before this Court the validity of warrantless administrative inspections authorized by Congress as an integral part of a defined regulatory scheme designed to assure swift compliance and enforced by civil process before an administrative forum rather than criminal prosecutions in the district courts. The Occupational Safety and Health Act of 1970 was passed to alleviate the "drastic" problem of work-related deaths, disease and injuries by assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions."

^{1/}

"A." references are to the joint appendix filed with this brief. "Leg. Hist." references are to the Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. (June 1971).

29 U.S.C. 651; Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 444-45 and n. 1 (1977).^{2/} To this end it imposes on any non-governmental employer whose business affects commerce a statutory duty to maintain safe working conditions with the exception of "...working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. 654(a), 652(5), 653. This duty is implemented

^{2/} The widespread serious hazards which called forth the Act are inter alia explained in S.Rep. 91-1282, 91st Cong. 2d Sess. 2-4 (1970), Leg. Hist. 142-144:

The problem of assuring safe and healthful workplaces*** ranks in importance with any that engages the national attention today. *** 14,500 persons are killed annually as a result of industrial accidents; *** during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work -- many times more than are lost through strikes *** [and] the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. *** Substantial numbers [of workers], even today, fall victim to ancient industrial (continued)

by the Secretary of Labor, whose compliance officers are authorized to inspect workplaces and issue citations specifically describing safety and health violations, fixing reasonable abatement times, and proposing civil penalties "[i]f, upon inspection" they discover such violations. 29 U.S.C. 657(a), 658(a), 659(a). ^{3/} Citations which are not contested by

(2/ continued)

poisons such as lead and mercury.***Other materials long in industrial use are only now being discovered to have toxic effects. In addition, technological advances*** have brought numerous new hazards to the workplace. Carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, pesticides***all present incipient threats***In 1966-67 the Surgeon General***found that 65 percent of [142,000 sampled workers] were potentially exposed to harmful physical agents***or to toxic materials***and found that only 25 percent***were adequately [protected by existing controls].***As many as 3.5 million workers are exposed to some extent to [deadly] asbestos fibers***In sum, the chemical and physical hazards which characterize modern industry are not the problem of ***a single industry, nor a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.

The House Report (H.R. Rep. 91-1291, 91st Cong. 2d Sess. 14-15 (1970), Leg. Hist. 844-845) makes similar findings, concluding that occupational safety and health is "the most crucial [issue] in the whole environmental question***the worst problem confronting [over 80 million] American workers."

^{3/} The amount of the proposed penalty "if any" (29 U.S.C. 659 (a)) depends on the severity of the hazard and the cited employer's past diligence in attempting to discover and correct it (ibid.; see 29 U.S.C. 666(i) and (j)), and is designed to promote voluntary compliance by employers before an inspector arrives. 29 U.S.C. 651(1); see e.g., Leg. Hist. 463-464, 470 (Sen. Javits), 471-472 (Sen. Dominick), 853; Brennan v. OSHRC and Interstate Glass Co., 487 F.2d 438, 441, 443 (C.A. 8, 1973); Dunlop v. Rockwell International, 540 F.2d 1283, 1292 (C.A. 6, 1976). Cf.

employers ^{4/} within 15 workdays become final abatement orders, affording immediate relief to endangered workers. 29 U.S.C. 659(a); Brennan v. Winters Battery Mfg. Co., 531 F.2d 317, 321-324 (C. A. 6, 1976), cert. den. 425 U.S. 991. Citations which are timely contested on any ground of fact or law including the

(3/ continued)

National Independent Coal Operators' Assoc. v. Kleppe, 423 U.S. 389, 401 (1976). Proposed penalties may range up to \$1,000 for serious violations, and to \$10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666(a)-(c) and (j). See e.g., Intercounty Const'n. Co. v. OSHRC, 522 F.2d 777 (C.A. 4, 1975), cert. denied 423 U.S. 1032.

The Secretary may also propose a civil penalty of not more than \$1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final abatement order, 29 U.S.C. 659(b), 666(d), and may seek temporary injunctions in federal district court to correct imminent dangers before administrative enforcement would result in abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter to the Justice Department for criminal prosecution, which may result in a maximum sentence of 6 months' imprisonment and a \$10,000 fine. 29 U.S.C. 666(e). However, of approximately 400,000 inspections conducted since the Act's April 1971 effective date, only 5 have resulted in criminal prosecution under this provision.

4/ The statute imposes no enforceable obligations on employees, relying instead on the policy determination that "[f]inal compliance with the requirements of this act remains with the employer" because he has "primary control of the work environment and should insure that it is safe and healthful." S.Rep. 91-1282, supra, at 9, 10-11, Leg. Hist. 149, 150-151; H.R. Rep. 91-1291, supra, at 21, 23, Leg. Hist. 851, 853. See, e.g., Atlantic & Gulf Stevedores, Inc. v. OSHRC, 535 F.2d 541, 552-555 (C.A. 3, 1976); National Realty & Const'n. Co. v. OSHRC and Secretary, 499 F.2d 1257, 1261, 1265-68 and nn. 34-38, 41 (C.A.D.C., 1973).

claim of exemption for conditions regulated by other Federal agencies ^{5/} are tried before judges of the Occupational Safety and Health Review Commission, an independent administrative court created "to carry out adjudicatory functions under the Act" and empowered expeditiously to resolve contested matters.

29 U.S.C. 651(3), 659(c), 661; Restland Memorial Park, 540

F.2d 626 (C.A. 3, 1976). Marshall v. Able Contractors, Inc., (C.A. 9, No. 76-1615, Jan. 19, 1978) (Addendum C).

The judge's decision becomes the Commission's final order unless within 30 days a Commissioner directs further administrative review. 29 U.S.C. 661(i); 29 CFR 2200.90, .91. The Commission's subsequent order becomes binding unless the employer timely petitions an appropriate court of appeals. 29 U.S.C. 660(a). Employers' review petitions do not suspend their abatement duties, and such petitions are to be heard expeditiously. Ibid.

b. The Act directs the Secretary to set mandatory job safety standards, 29 U.S.C. 655, and inter alia creates important mechanisms for detailed recordkeeping by employers (29 U.S.C.

5/ See p. 3, *supra*; e.g., Southern Pacific Transportation Co. 1974-75 CCH OSHD ¶19,054 (Rev. Comm. 1975), *aff'd*, 539 F.2d 386 (C.A. 5, 1976), cert. denied, (1977); Southern Ry. Co. v. OSHRC, 539 F.2d 335 (C.A. 4), cert. denied, 97 S.Ct. 525 (1976); Baltimore and Ohio RR. Co. v. OSHRC, 548 F.2d 1052 (C.A.D.C., 1976).

657(c); 29 CFR Part 1904) and participation in standard-setting and enforcement by affected employees. ^{6/} But its center is the carefully-limited authority promptly to enter and inspect workplaces for occupational hazards "at reasonable times***within reasonable limits and in a reasonable manner" created by section 8(a), which provides in full that:

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized--

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee or an employer; and

6/ Employees are entitled, for example, to petition for new or revised standards, 29 U.S.C. 655(b)(1); to notice and hearing on employer applications for variances from standards, 29 U.S.C. 655(b)(6), 655(d); to periodic medical examinations at the employer's expense; and to be informed of all occupational hazards to which they may be exposed as well as the symptoms caused by unsafe exposures. 29 U.S.C. 655(b)(7). They are also entitled to file complaints of job hazards and secure prompt Departmental inspection to correct them, 29 U.S.C. 657(f), 662; to accompany the inspector during his visit to work areas, 29 U.S.C. 657(e); to contest proposed abatement periods as unreasonably long and participate as parties before the Review Commission in employer contests, 29 U.S.C. 659(c); and to seek appellate review of adverse Commission decisions. 29 U.S.C. 660(a). Their exercise of any of these statutory rights is expressly protected against employer retaliation. 29 U.S.C. 660(c); cf. Phillips v. Board of Mine Appeals, 500 F.2d 772, 778-783 and n. 24 (C.A.D.C., 1974), cert. den. 420 U.S. 938. The Courts have specifically referred to the need for such enforcement by affected employees if the Act's goals are to be achieved. See, e.g., Industrial Union Dep't., AFL-CIO v. Hodgson, 499 F.2d 467, 482 and n. 37, 483-484 and n. 42 (C.A.D.C., 1974).

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and material therein, and to question privately any such employer, owner, operator, agent or employee.

Without the ability to make the flexible unannounced visits contemplated by this provision, the Secretary can neither discover hazards threatening employees, 29 U.S.C. 657(f)(1), 662, nor investigate to determine what working conditions are regulated by another Federal agency, 29 U.S.C. 653(b)(1).^{7/} The possibility of such inspections, like the knowledge that violations discovered by inspectors will lead to monetary sanctions, is essential to secure the broad voluntary compliance on which the program depends.^{8/} Congress recognized that workplace hazards are so pervasive and easily concealed that unannounced visits were warranted, since "advance notice to an employer has been a prime cause of the breakdown in***enforcement" under other federal job-safety statutes (H.R. Rep. 91-1291, supra, at

7/ Nor without effective authority to inspect can he investigate job-related fatalities or catastrophes, 29 CFR 1904.8; reinspect workplaces to determine compliance with abatement orders, 29 U.S.C. 659(b), 660(b); or investigate claims that employers have retaliated against workers for exercising their rights under the statute. 29 U.S.C. 660(c).

8/ See, e.g., 29 U.S.C. 659(a) and (b); Usery v. Godfrey Brake & Supply Service, 545 F.2d 52, 55 (C.A. 8, 1976); Dunlop v. Rockwell International, 540 F.2d 1283, 1292 (C.A. 6, 1976); Brennan v. OSHRC and Interstate Glass Co., 487 F.2d 438, 441, 443 (C.A. 8, 1973). Cf. Nat'l. Indep. Coal Operators' Ass'n. v. Kleppe, supra, 423 U.S. at 401; Godwin v. OSHRC, 540 F.2d 1013, 1016 (C.A. 9, 1976).

27; Leg. Hist. 857). It accordingly declared that "an effective enforcement program" requires inspections made without advance notice (29 U.S.C. 651(10)) and authorized the inspector to enter regulated work areas "without delay" (29 U.S.C. 657(a)).^{9/}

c. Inspections conducted under this provision and binding regulations (29 U.S.C. 657(g)(2)) are statutorily limited to "regular working hours and***other reasonable times" as well as the work areas and occupational hazards at which the Act is aimed. Brennan v. Buckeye Industries, 374 F.Supp. 1350, 1354 (D. Ga., 1974). The premises to be visited are not selected by individual inspectors in the field, but by Departmental area directors using a centralized computer system which provides lists of establishments ranked by such objective criteria as the injury frequency in the pertinent industry, the number of workplace employees exposed, and the density of different types of business in each geographic area.^{10/} These criteria were originally developed for so-called "random" or "general schedule"

9/ Indeed, Congress expressly prohibited "giving [unauthorized] advance notice of any inspection" and subjected such conduct to criminal sanctions. 29 U.S.C. 651(10), 666(f). The only situations in which the Secretary has authorized advance notice involve circumstances where swift detection and correction of hazards would, on balance, be promoted rather than frustrated by this practice. See 29 CFR 1903.6(a) and (b).

10/ See U.S. Dep't. of Labor, Occupational Safety and Health Administration, Field Operations Manual, pp. IV-1 and 2 (rev. ed., Jan. 1976), 1 CCH Emp. Safety & Health Guide Para. 4327; U.S. Dep't. of Labor, Occupational Safety & Health Administration, Field Performance Evaluation System Manual, Chap. II, App. A and Attachment 3 (rev. ed., Aug. 1976) (attached as Addendum A).

inspections to "establish OSHA's presence as widely as possible within...available resources" and "provide broad representative inspection coverage of the working conditions of employees in an area...in proportion to the density of employees in that area" and the types and sizes of establishments within it. Field Operations Manual, pp. IV-2 and 3 (July 1974) (Addendum B). No inspection can be made without "presenting appropriate credentials to the owner, operator, or agent in charge." 29 U.S.C. 657(a). Those credentials identify inspectors by name, area office and office, and photograph and repeat the statutory authority to inspect. Usery v. Godfrey Brake & Supply Service, supra, 545 F.2d at 53-55.^{11/} On being conducted to the "agent in charge" this inspector is additionally required to explain the nature, purpose and scope of the proposed inspection. 29 CFR 1903.7(a). Trade-secret and other employer privacy interests are expressly protected. 29 U.S.C. 664, 665; 29 CFR 1903.9. Inspectors must avoid unreasonable disruption of business operations as well as comply with the employer's work rules. 29 CFR 1903.7(c) and (d). The employer is entitled to accompany the inspector and may object to the conduct of the inspection. 29 U.S.C. 657(e); 29 CFR 1903.4, 1903.7(e), 1903.8. Finally, these inspections

^{11/} Inspectors may offer a toll-free verifying call to their area offices if these credentials do not convince employers of the requested inspection's propriety. Ibid.

pose relatively little threat of criminal liability. They are intended to secure prompt civil correction of occupational hazards rather than discover evidence of crimes, and do not result in criminal prosecutions even where deliberate disobedience or repeated non-compliance is involved. N. 3, supra; Atlas Roofing Co. v. OSHRC, supra. The statute provides no sanctions for simple refusals to permit inspections. In implementing its inspection provision, the Secretary has required inspectors to seek compulsory process authorizing entry if the employer refuses to consent. 29 CFR 1903.4.

3. Pertinent facts

Northwest is a large domestic and international air carrier and occupies, among others, Hangar No. 1 at JFK International Airport in Jamaica, New York. On October 27, 1976, Efraim Zoldan, a duly authorized compliance officer for the Occupational Safety and Health Administration, presented his credentials to the agent in charge of Hangar No. 1 seeking to enter and conduct an inspection pursuant to sections 8(a)(1) and (2) of the Act (A. 18, 127). Notwithstanding Zoldan's statutory authority to "enter without delay," the agent in charge of Hangar No. 1 refused to allow Zoldan's entry (A. 18, 127).

On November 4, 1976, Zoldan appeared before United States Magistrate Vincent Catoggio to obtain an inspection warrant for Northwest's workplace at Hangar No. 1 (A. 18, 29-32, 127). Based upon Zoldan's sworn application on behalf of the Secretary, Magistrate Cattoggio issued an inspection warrant authorizing the Secretary to enter and inspect Northwest's facility (A. 18, 33-34, 127). ^{12/} On the following day, Zoldan again appeared at Hangar No. 1 and was again refused entry to Northwest's facility (A. 19, 127-128). Later that day, counsel for Northwest notified the Secretary that he would appear before the magistrate seeking to quash the Secretary's warrant (A. 19, 128).

^{12/} The Secretary's application represented, inter alia, that Hangar No. 1 had been inspected on at least two prior occasions resulting in citations for 13 violations of the standards promulgated pursuant to the Act (A. 29, 30). The application also stated that the Bureau of Labor Statistics had analyzed industrial injury rates and concluded that "certificated carriers in the air transportation industry such as this establishment, have the seventeenth highest injury rate out of the ninety industries analyzed" and that "(t)he industry's prominent place on this list has caused the Occupational Safety and Health Administration to assign priority to inspection of establishments in this industry" (A. 30).

At the hearing, counsel for Northwest presented the Magistrate with a copy of a decision issued on September 28, 1976 by the Commission's Administrative Law Judge Jerome C. Ditore (A. 19, 126-27). That decision vacated a previous citation issued to Northwest, alleging a "serious" violation of the Act's general duty clause, because the specific working condition at issue was regulated by the Federal Aviation Administration and OSHA was accordingly preempted from enforcing that citation by section 4(b)(1) of the Act (A. 36-56).^{13/} The magistrate, after hearing argument from both sides with respect to the effect

^{13/} This citation was the result of the Secretary's inspections of Hangar No. 1 on April 24, 25 and 29, 1975 (A. 37). The alleged general duty violation charged Northwest with failing to protect ground maintenance employees, while changing landing lights on Boeing 747 aircraft, from the hazard of being crushed by the aircraft's electro-pneumatically controlled leading edge flaps (A. 19, 37, 125). Judge Ditore vacated the Secretary's citation and sustained Northwest's affirmative 4(b)(1) defense holding that OSHA "cannot enforce its regulations covering specific working conditions where another Federal agency has exercised its statutory authority over the same conditions" (A. 19, 46, 126-27). On October 28, 1976, Commissioner Cleary directed review of the judge's decision by the full Commission (A. 360). As of the filing of this brief, the case was still pending before the Commission. See Northwest Orient Airlines, Inc., OSHRC Docket No. 13649, 1976-77 CCH OSHD ¶21, 225 (Sept. 28, 1976).

of Judge Ditore's decision, issued the following order:

"Search warrant vacated in view of FAA preempting at least part of the area as indicated to me today for the first time as per decision of Administrative Judge Ditore, Sept. 28, 1976."

(A. 58, 128).

4. District Court proceedings

Following the magistrate's quashing of the warrant, the Secretary on December 1, 1976, applied to the District Court for the Eastern District of New York for an order (1) directing the magistrate to reinstate the inspection warrant, or (2) compelling Northwest to submit to an inspection (A. 15-16). The Secretary asserted that Magistrate Catoggio had erred in quashing the warrant because (1) Judge Ditore's decision was not a final order of the Review Commission but was on appeal by the Secretary, see 29 U.S.C. 659(c), (2) Judge Ditore's decision was limited to one particular set of working conditions, whereas the inspection specified in the warrant was for the general inspection of Hangar No. 1, and (3) Northwest had failed to exhaust its administrative remedies in that the exemption issue should have been presented to the Commission and not the magistrate (A. 20). Northwest essentially argued that Judge Ditore's decision was dispositive of the exemption issue, that FAA had exercised its authority to prescribe regulations for the safety of ground maintenance crews, and that the Secretary was

accordingly not entitled to the relief sought (A. 60, 79-81). Affidavits were filed by both parties and on December 20, 1976, a hearing was held before the Honorable Edward R. Neaher (A. 84-122).

5. The District Court's Decision

On June 10, 1977, Judge Neaher issued a decision and order granting the relief sought by the Secretary and directing the magistrate to reinstate the inspection warrant (A. 123-132). The judge agreed with the Secretary that Northwest had failed to exhaust its administrative remedies and that "the courts are forbidden to determine [statutory] coverage prior to the [agency's] quasi-judicial proceeding for deciding that question..." (A. 128). Accordingly, in the instant context, Judge Neaher stated that

... questions concerning the coverage of OSHA are presentable first to the Commission, which rules on complaints filed by the Secretary when an employer contests a citation, and then, on appeal, to the Court of Appeals.

(A. 128-129).

The judge also dismissed Northwest's contention that Judge Ditore's decision was res judicata with respect to the exemption issue. In this regard, the Court noted that both the parties and issues in the two proceedings must be identical to trigger the doctrine of res judicata, and that

[t]he issue before the administrative law judge cannot be considered identical to the one before this court. Whereas the prior proceeding was limited to the issue of whether FAA safety regulations concerning the changing of landing lights on defendant's

Boeing 747 aircraft precluded OSHA from imposing its own regulation on such work, this action involves the working conditions in an entire hangar. To the extent the decision of the administrative law judge appeared to grant defendant an exemption covering all the conditions under which its ground maintenance employees work, it must be considered obiter dictum in light of the narrow point actually at issue.

(A. 129-30). The Court further recognized that section 4(b)(1) was not intended to create industry-wide exemptions based upon the regulation of a specific working condition by a sister agency (A. 130).

The Court finally noted that Judge Ditore's decision could have no res judicata effect here because "in this case defendant is presenting merely the initial decision of an administrative law judge which is not the final order of the Commission under 29 U.S.C. 661(i). Since the Commission is still reviewing that decision, it is not entitled to res judicata effect" (A. 131).

On June 15, 1977, Northwest filed its Notice of Appeal and subsequently moved the District Court to reargue and reconsider its June 10 order or, alternatively, to stay the order pending resolution of this appeal. (A. 133-34, 135-36, 137-42). The Secretary opposed reconsideration of the order but filed no opposition to the requested stay (A. 143). On July 5, 1977, Judge Neaher denied Northwest's motion for reargument, but granted its motion for stay (A. 143-44). On July 13, 1977, Northwest again filed a Notice of Appeal from the District Court's order

denying the motion to reargue Judge Neaher's earlier decision (A. 145-146). By stipulation of the parties on August 12, 1977, both appeals were consolidated before this Court (A. 147-48).

ARGUMENT

I. INTRODUCTION

As noted, supra, the District Court upheld the Secretary's warrant in this case finding that it was issued upon probable cause and that 4(b)(1) contentions were insufficient to block an inspection, since such contentions must be raised in the first instance before the Review Commission. Attacking the District Court's decision, Northwest contends in the proceeding that warrantless inspections cannot be conducted by OSHA compliance officers (Br. pp. 33-42), and, further, that the statute cannot be read to empower the District Court to issue a warrant based upon probable cause (Br. pp. 42-47). Finally, it contends that even if such a warrant can issue, it should not have issued here unless the magistrate determined whether OSHA retained under section 4(b)(1) the authority to regulate the working conditions in Northwest's premises.

Below, we show first that the District Court should be affirmed since a warrant in this case was not even required since

employers have no privacy expectation, sufficient to invoke the warrant requirement, in work areas routinely open to their employees and expressly regulated for those employees' benefit. Moreover, nothing in the Amendment's reasonableness criterion or the Supreme Court's cases precludes Congress' clear intent to authorize these limited warrantless inspections from being carried into effect.^{14/}

We then show that in any event, if a warrant is required, the warrant here was properly issued.

^{14/} Contrary to Northwest's apparent belief (Br.p. 33), the Secretary, in seeking a warrant, has not conceded that one was required. This issue of facial unconstitutionality cannot be avoided simply because the Secretary has issued an interim regulation directing his compliance officers to obtain warrants if employers refuse to admit them. Until the Supreme Court resolves the warrant issue, the Secretary's only choice is either to seek compulsory process or grant refusing employers immunity from enforcement, since forcible entry is not an option. Thus the fact a warrant was obtained here neither moots the threshold issue nor reduces it to a (continued)

II. WARRANTLESS OSHA INSPECTIONS ARE "REASONABLE"
UNDER THE FOURTH AMENDMENT

A. The Act authorizes warrantless inspections

There can be no serious question that the Act authorizes routine regulatory inspections of work areas, upon presentation of credentials, without either a warrant procedure or the independent fact-finding function which alone would justify one.

South Dakota v. Opperman, 428 U.S. 364, 370 n. 5 (1976); U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976); Camara v. Municipal Court, 387 U.S. 523, 532 (1967). Section 8(a) facially authorizes immediate reasonable entry to "any factory ... or other ... workplace" without referring to either of these elements. Innumerable federal regulatory statutes contain similar provisions,^{15/} which have

14/ (cont'd)

question of whether warrant procedures may be inferred. The Supreme Court has acknowledged as much by noting probable jurisdiction in Barlow's on the threshold issue, notwithstanding the fact a warrant was obtained. 97 S.Ct. 1642; see 424 F. Supp. at 429.

15/ See e.g., 21 U.S.C. 374(a) (Food, Drug & Cosmetic Act); 18 U.S.C. 923(g) (Gun Control Act of 1968); 7 U.S.C. (Supp. V) 136g (Environmental Pesticide Control Act); 7 U.S.C. 2146(a) (Animal Welfare Act of 1970); 8 U.S.C. 1225(a) (Immigration and Nationality Act); 15 U.S.C. 1270 (inspection of any factory or warehouse for "hazardous substances" by Secretary of Health, Education and Welfare); 15 U.S.C. (Supp. V) 1401(a)(2) (National Traffic and Motor Vehicle Safety Act); Pub. L. 94-469, Section 2, 90 Stat. 2003, (Toxic Substances Control Act); 21 U.S.C. 603 (Secretary of Agriculture's inspection of meat and meat products); 21 U.S.C. 1034(a), (b), (d) (Egg Products Inspection Act); 26 U.S.C. 5146(b), 7606 (Internal Revenue Code of 1954); 29 U.S.C. 211(a) (Fair Labor Standards Act); 30 U.S.C. 723,

uniformly been construed as authorizing warrantless inspections and must be presumed to reflect Congress' meaning here. See e.g., U.S. v. Biswell, 406 U.S. 311 (1972), (Gun Control Act); Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970), (Revenue Code liquor revenue control); U.S. v. Litvin, 353 F. Supp. 1333 (D.D.C. 1973) (Food, Drug & Cosmetic Act); U.S. v. Business Builders, 354 F.Supp. 141 (D. Okla. 1973) (same); U.S. v. Del Campo Baking Co., 345 F.Supp. 1371 (D. Del. 1972) (same); Youghiogheny & Ohio Coal Co. v. Morton, 345 F.Supp. 45 (D. Ohio 1973) (three-judge court) (Coal Mine Health & Safety Act); U.S. ex rel Terraciano v. Montanye, 493 F.2d 682 (C.A. 2, 1974), cert. den. 419

15 / (cont'd)

724 (Metal and Nonmetallic Mine Safety Act); 30 U.S.C. 813 (Coal Mine Health and Safety Act); 41 U.S.C. 38 (Walsh-Healey Act) (Supp. V); 41 U.S.C. 53 (Anti-Kickback Act); 42 U.S.C. 262(c) (Public Health Service Act); 42 U.S.C. 263 (Clinical Laboratories Improvement Act); 42 U.S.C. 1857c-9 (Clean Air Act); 42 U.S.C. 1857f-6 (Air Pollution Control Act); 42 U.S.C. 2035(c), 2051 (Atomic Energy Act); 42 U.S.C. 413(a) and (b) (National Mobile Home Construction and Safety Standards Act of 1974); 42 U.S.C. 6927 (Resources Conservation and Recovery Act); 45 U.S.C. 437(c) (Railroad Safety Act); 46 U.S.C. 239, 362, 404 (Bureau of Marine Inspection Act); 46 U.S.C. 408 (Coast Guard inspection of vessel boiler plates at manufacturer's plant); 49 U.S.C. 1425(b) (Federal Aviation Act); 49 U.S.C. 1677(a)(3), 1681(b) (Natural Gas Pipeline Safety Act); 49 U.S.C. 1808(c) (Transportation Safety Act of 1974). See also Colonnade Catering Corp. v. U.S., 410 F.2d 197, 204 n. 6 (C.A. 2, 1969), reversed on another ground, 397 U.S. 72.

U.S. 875 (state narcotics control statute); U.S. v. Western & A.R.R., 297 Fed. 482 (D. Ga. 1924) (Railroad Safety Appliance Act of 1908) 16/

In any event, Congress specifically intended warrantless OSHA inspections. It not only directed entry "without delay" and expressly banned advance notice of inspections from its "effective enforcement program" because that practice had undermined other job-safety statutes, pp 8-9, supra, but repeatedly characterized section 8(a) as conferring a right reasonably to enter and inspect workplaces for occupational

16/ Numerous state occupational safety and health statutes contain similar warrantless inspection provisions. See, e.g., Alaska Stats., Sec. 18.60.083; Ariz. Rev. Stat. Ann., Tit. 23 c. 2. Art. 10. Sec. 23-408; Cal. Labor Code, §6314(a) (West 1976); Colo. Rev. Stat., Sec. 80-1-12; Ill. Rev. Stats. c. 48, Secs. 59.2(b)(1) and (2); Indiana Code, Secs. 1-23.1, 22.8-1; Montana Rev. Code, Sec. 4213(1) and (2); Md. Ann. Code, Art. 89, Sec. 35(a); Minn. Stat., Sec. 182.659, Subd. 1; N. Mex. Stat. Ann., Sec. 59-14-9; Nevada Rev. Stat., Sec. 618.225; North Carolina General Stats., Sec. 95-133, 136; Oregon Rev. Stat., Sec. 654,067; Tenn. Code Ann., Sec. 50-520; 21 Vermont Stats., C. 101, Sec. 101.02(15) (g).

safety and health purposes.^{17/} Its belief such authority was needed to combat pervasive workplace dangers was evidenced, for no bill was introduced in either house which did not contain similar powers.^{18/} Moreover, Representative Steiger, the Act's

^{17/} See, e.g., 29 U.S.C. 667(c)(3), requiring that State plans provide "for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8" (emphasis added). S. Rep. No. 91-1282, supra, at 11 (Leg. Hist. 151) states:

In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employment establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment*** to inspect and investigate within reasonable limits all pertinent conditions***.

H.R. Rep. No. 91-1291, supra, at 22 (Leg. Hist. 852), is to the same effect.

^{18/} See, e.g., S. 2193, 91st Cong. 1st Sess. Sec. 5(a) (1969), Leg. Hist. 10-11 (Williams bill); S. 2788, 91st Cong. 1st Sess. Sec. 6(a) (1969), Leg. Hist. 46 (Javits bill); S. 4404, 91st Cong. 2d Sess. Sec. 9(a) (1970), Leg. Hist. 92 (Dominick bill); H.R. 3809, 91st Cong. 1st Sess. Sec. 5(a) (1969), Leg. Hist. 638-639 (O'Hara bill); H.R. 13373, 91st Cong. 1st Sess. Sec. 6(a) (1969), Leg. Hist. 694 (Ayres bill).

co-sponsor and the author of this Section's final version, stated that neither employers nor their agents were entitled to delay or deflect entry once the inspector arrived. Leg. Hist. 1076. And he pertinently added that "it is our intent ***that the Federal inspector should gain entry to a business ***with an absolute minimum of delay" and was meant neither "to wait an inordinate amount of time" for an agent in charge nor "give up and go back to his office." Ibid. That intent is incompatible with any statutory requirement that a warrant be obtained where entry is refused inspectors. As the Eighth Circuit recently concluded in summarizing this legislative history, as a matter of statutory construction employers may condition neither the right of entry nor their consent to it once credentials have been presented, since "Prompt, unannounced inspections are an important element in enforcement of this Act. Undoubtedly the provision for entry 'without delay', like the advance notice provision, prevents subversion of the program and encourages consistent compliance." Usery v. Godfrey Brake & Supply Service, supra, 545 F.2d at 55. Cf. U.S. v. Biswell, supra, 406 U.S. at 315. Therefore, if warrants are required they must flow directly from the Amendment and relevant Supreme Court decisions.

B. Employers have no privacy interest, sufficient to invoke a warrant requirement, in regulated work areas routinely open to their employees

1. The Supreme Court has recognized that there are levels of protected privacy within the Amendment and that business may expect neither the procedural safeguards applicable to private

residences nor the narrow scope of substantive intrusion applicable there. See, e.g., G.M. Leasing Corp. v. U.S., supra, 97 S.Ct. 619, 629, 630; U.S. v. Martinez-Fuerte, supra, 428 U.S. at 501-502 passim; U.S. v. Biswell, supra, 406 U.S. at 317. It has held not only that the Amendment turns on such privacy expectations, e.g., Katz v. U.S., 389 U.S. 347 (1967), but that even such deeply rooted /considerations as land use vis-a-vis invitees and trespassers may give way before statutorily protected worker interests. See, e.g., Hudgens v. N.L.R.B., 424 U.S. 507, 521-23 (1976); Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 802 n. 8 (1954). It has repeatedly stated that "The more an owner, for his advantage, opens up his property for use by the public...the more do his rights become circumscribed by the statutory...rights of those who use it," Marsh v. Alabama, 326 U.S. 501, 506 (1946); that "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz ^{19/}supra, 387 U.S. at 351; and that the so-called "automobile exception," once thought to rest on mobility, is centrally related to the more basic fact that "One has a lesser expectation of

^{19/} See, e.g., U.S. v. Lewis, 385 U.S. 206, 213 (1966): While the "Amendment protects against governmental intrusion upon 'the sanctity of a man's home and the privacies of life'...the occupant can break the seal...Plainly he does this to the extent he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him. The seller can not...complain that his privacy has been invaded so long as the agent does no more than buy his wares" (Brennan, J., concurring).

privacy in a motor vehicle because...it seldom serves as one's residence or as the repository of personal effects." South Dakota v. Opperman, supra, 428 U.S. at 367-368, quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974). Cf. U.S. v. Chadwick, 97 S.Ct. 54 (1977). It has emphasized that under the Amendment's overriding reasonableness standard the validity of warrantless searches must be determined on a program-by-program basis which carefully weighs those privacy expectations against the degree of encroachment upon them and the protection a warrant procedure could meaningfully afford. Camara, supra, 387 U.S. at 533-34, 536-537; See v. Seattle, 387 U.S. 541, 546 (1967); Martinez-Fuerte, supra, 428 U.S. at 555, 564-566; South Dakota v. Opperman, supra, 428 U.S. at 372-376 (majority), 382-384 (Powell, J., concurring). And it has treated as significant in determining "reasonableness" both explicit Congressional findings that such inspections are necessary, e.g., U.S. v. Watson, 423 U.S. 411 (1976), and the fact that no "self-protection interests of the [occupant]" arising from proximate criminal liability are involved. Camara, supra, 387 U.S. at 531; see South Dakota v. Opperman, supra.^{20/}

^{20/} In Ingraham v. Wright, 97 S.Ct. 1401, 1413-14 and n. 42 (1977) the Court recently appeared to limit Camara and See to the criminal contexts in which they arose, stating that while the Fourth Amendment's "overriding function...is to protect personal privacy and dignity against unwarranted intrusion by the State," the "principal concern of that Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations" (emphasis added).

We do not contend that employees are fully equatable with "the public" or that commercial occupants may not have compelling privacy expectations in other circumstances. Cf., e.g., G.M. Leasing Corp. v. U.S., supra. But we think it plain that any relevant expectations are substantially diminished where, as here, the scope of inspection is precisely limited to areas the employer has routinely opened to his workforce, especially vis-a-vis inspectors meant to insure the health and safety of the very workers the employer has assigned to those areas for his profit. Cf. Clarkson Const'n. Co. v. OSHRC, 531 F.2d 451, 458 (C.A. 10, 1976). Simply put, the Act guarantees employees safe working conditions, and the employer cannot assert his property interest to bar inspectors attempting to assure the guarantee. At the very least, the privacy interests at stake here do not approach those which would be implicated by warrantless search of a private residence, or of a businessman's person or files. Nor are they comparable to those implicated by the warrantless entries into a locked trunk and glove compartment respectively upheld in Cady v. Dombrowski, 413 U.S. 433 (1973) and South Dakota v. Opperman, supra. The Supreme Court has held that bank depositors lack Fourth Amendment privacy expectations in records containing "information voluntarily conveyed to...banks and exposed to their employees in the ordinary course of business." U.S. v. Miller, 425 U.S. 435, 442 (1976). Here too the relevant privacy interest, "if it can be said to exist, is abstract and theoretical." Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974).

2. Even if regulated employers' privacy interests are cognizable they are both minimal and minimally invaded under this Act. The statute is enforced by civil process and civil abatement orders meant to correct workplace hazards, not impose personal sanctions on employers. Atlas Roofing Co. v. OSHRC, supra, 430 U.S. at 445-46. It is not only aimed at business premises, which have "Historically...been subject to broad visitorial power," Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 204 (1946), but specifically limited to regulation of a defined topic---working conditions---which inspectors know to be present and to bring the work areas inspected "within the proper scope of official scrutiny" (Almeida-Sanchez v. U.S., 413 U.S. 266, 271-272 (1974); see Restland Memorial Park, 540 F.2d 626 (C.A. 3, 1976)); it does not authorize inspections on the basis of occupants' generalized existence or their mere status as businesses or taxable entities. Ibid.; cf. G.M. Leasing Corp. v. U.S., supra, 97 S.Ct. at 629, 630. The employer is made presumptively aware of the inspection's limits by published regulations (29 CFR Part 1903; see 44 U.S.C. 1507) as well as the statutory duty to know the Act's requirements and their detailed application to his workplace.^{21/} He is made actually aware of inspection's justification and scope by the required

^{21/} N. 3, supra. See, e.g., 29 U.S.C. 654(a), 657(e), 666(j), 29 CFR 1903.7(e), 1904; Ames Crane & Rental Service v. Dunlop, 532 F.2d 123 (C.A. 8, 1976); Brennan v. Butler Lime & Cement Co. 520 F.2d 1011, 1016-18 (C.A. 7, 1975); Accu-Namics v. OSHRC, 515 F.2d 828, 835 (C.A. 5, 1975), cert. den. 425 U.S. 903; Messina Const'n. Corp. v. OSHRC, 505 F.2d 701 (C.A. 1, 1974). See, generally National Realty & Const'n. Co. v. OSHRC, 489 F.2d 1257, 1261-66 and nn. 34-38 (C.A.D.C., 1973).

credentials and opening explanation. There is no danger he will be "left to wonder about the purposes of the inspector or the limits of his task," Biswell, supra, 406 U.S. at 316, and little reasonable expectation of privacy where he has employees who enter the area subject to inspection every day, who are the Act's intended beneficiaries, and who may freely observe and report suspected violations. 29 U.S.C. 657(f), 660(c); Industrial Union Dep't. v. Hodgson, 499 F.2d 467, 482 and n. 37, 484 and n. 42 (C.A.D.C., 1974). Since the Secretary's trained compliance officers are only to inspect, during "regular hours" and "in a reasonable manner," areas where employees work and equipment and materials used while doing so, they "do not...intrude into any zone of privacy which the [employers] reasonably expect to remain inviolative." Youghiohgeny & Ohio Coal Co. v. Morton, supra, 364 F. Supp. at 51 (three-judge court). There is thus minimal "objective" intrusion on employers, and no "subjective intrusion," no fright. U.S. v. Martinez-Fuerte, supra, 428 U.S. at 558-560. As one court has noted, the violations discovered during such an OSHA inspection "were in plain, obvious view [within the plant]. There was no search here of drawers or other sequestered areas. For that reason [the employer] may not rely on the Camara/See precedent." Lake Butler Apparel Co. v. Secretary, 519 F.2d 84, 88 (C.A. 5, 1975). Cf. Bloomfield Mech. Contracting v. OSHRC, 519 F.2d 1257, 1263 (C.A. 3, 1975) (construction contractor lacks Fourth Amendment standing to object to OSHA inspection of worksite open to his and other employers' workers).

Moreover, there are significant statutory buffers here. Employers may make a toll-free verifying call to the inspector's officer, are entitled to accompany him on his tour of the premises and may refuse entry to trade-secret or secured areas until a protective order is obtained. There is also an administrative buffer, for decisions as to which workplaces to inspect are made "not by [individual] officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources." Martinez-Fuerte, supra, 428 U.S. at 559. Indeed, those decisions are made pursuant to Departmental directives and computer lists which leave even Area Directors little discretion in this sphere. Supra, 9-10 and n. 10. These factors are precisely those the Supreme Court has relied upon in concluding that a warrant is not constitutionally required, both because they remove any chance that "the decision to enter and inspect will...be the product of the unreviewed discretion of the enforcement officer in the field" (See v. Seattle, 387 U.S. at 545) and because they leave no meaningful function for a neutral magistrate to perform. E.g., Martinez-Fuerte, supra, 428 U.S. at 559-561, 564-566; South Dakota v. Opperman, 428 U.S. at 370 n. 5, 374-376 (majority), 382-384 (Powell, J., concurring). ^{22/}

^{22/} This is particularly true because the magistrate apparently cannot review the basic selection criteria in any detail, but only whether the establishment to be inspected falls within them. E.g., Camara, 387 U.S. at 532, 538; Oklahoma Press Pub. Co. v. Walling, supra, 327 U.S. at 208-210, cited with approval in Camara, 387 U.S. at 539, and See, 387 U.S. at 544-545 (test for enforcement of administrative subpoena which is the functional equivalent of an inspection warrant is simply whether "the investigation is authorized by Congress" pursuant to its exercise of an Article I power and "the [information] sought [is] relevant to that inquiry"). See also cases cited in text supra.

That result is particularly appropriate because the Act does not envision threshold district court intervention. It is enforced by an integrated administrative process in which inspection is merely the initial step, which proceeds rapidly to final administrative abatement orders, and which is designed to resolve contested matters in the swiftest possible time to protect endangered employees. Brennan v. Winters Battery Mfg. Co., 531 F.2d 317, 322-323 (C.A. 6, 1975), cert. den. 425 U.S. 991. The Occupational Safety and Health Review Commission was created specifically to resolve all contested enforcement matters under the statute, can routinely rule on any objections to the scope, conduct, or reasonableness of particular inspections without burdening the courts and should be permitted to do so here. E.g., Martinez-Fuerte, 428 U.S. at 559, 565-566; Restland Memorial Park, supra. As the Supreme Court has noted, "Congress is not required by the [Constitution] to choke the already crowded federal courts with new types of litigation nor prevented from committing [them] to administrative agencies with special competence in the relevant field." Atlas Roofing Co. v. OSHRC, supra, 430 U.S. at 455. ^{23/}

^{23/} See also Ingraham v. Wright, supra, in which the Court concluded that the protection afforded by post-hoc civil damage actions obviated any need to require due-process hearings prior to imposition of corporal punishment in the public schools.

C. The Amendment does not require warrants for reasonably limited inspections which do not implicate core privacy interests and are expressly required to effectuate a comprehensive federal regulatory scheme

1. This case is not governed by Camara or See, which held the Amendment barred criminal prosecution of occupants refusing to consent to warrantless housing code inspections and involved neither comprehensive federal regulatory programs nor the urgent interests which underline them. Camara involved a private residence implicating a core privacy interest, and significantly rested on the lack of any showing that a warrant requirement would impede elimination of hazards "that were relatively difficult to conceal...in a short period of time." 387 U.S. at 533; U.S. v. Biswell, 406 U.S. at 316. While See extended this requirement to a commercial warehouse, that facility was locked to everyone but its owner (408 P. 2d at 263; cf. U.S. v. Chadwick, 97 S.Ct. 2476 (1977), and the decision did not preclude warrantless entries "In the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope... [and conducted] on the authority of a valid statute." 406 U.S. at 315. ^{24/} Moreover, both decisions were designed to remedy a "grave danger" of institutionalized abuse created by the fact that

^{24/} In addition, See's expectation of privacy vis-a-vis that particular program was no less than that of a private resident, since he, no more than Camara, had any reason to anticipate governmental visits to determine whether his toilets were working or he had rats in his trash. That is scarcely true where the sole focus of both the regulating statute and inspections implementing it is working conditions which only businesses maintain.

"the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises,... the lawful limits of the inspector's power to search,...[or] whether the inspector himself is acting under proper authorization." 387 U.S. at 552, 544-545; see Martinez-Fuerte, supra, 428 U.S. at 559. Since occupants were systematically subjected "to the [unreviewable] discretion [to inspect] of the official in the field" and were required to risk criminal prosecution even to raise such questions (387 U.S. at 532-533), a warrant requirement was imposed on those particular programs. However, the Court carefully noted that this result did not reach either federal business-regulatory schemes or other programs whose enforcement might needlessly be hampered by such a requirement. 387 U.S. at 539-540, 545-546; see Biswell, supra, 406 U.S. at 313, 315-316; U.S. ex rel. Terraciano v. Montanye, supra, 493 F.2d at 684.

2. None of the factors on which Camara and See turned--- significant encroachment on core privacy expectations, lack of notice regarding inspection's proper purpose and scope, a criminal gauntlet which occupants must run to obtain such notice, and the compatability of warrant procedures with effective enforcement---are present under this statute. As detailed supra, employers' privacy expectations are minimal and minimally intruded upon by OSHA inspections; they cannot claim they are unaware of inspections' purpose and limits, which must inter alia be presented through credentials and explained orally before any

entry may proceed. The Act provides no sanctions for refusal to permit inspection. The "large [societal] interests" endangered by hazardous working conditions, like the necessity of effective inspection to ameliorate those hazards, 406 U.S. at 315, are plain. N. 2, supra. Finally, as Congress explicitly indicated, pp. 20-21, supra, "inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment" because a warrant procedure is fundamentally inconsistent with the circumstances covered by this Act. U.S. v. Biswell, supra, 406 U.S. at 316.

A warrant requirement would significantly impede OSHA's effectuation, whether the warrant is sought after access is refused or prior to any attempt to inspect. As the Supreme Court noted in See v. Seattle, supra, 387 U.S. at 545 n. 6, "surprise may often be a crucial aspect to routine inspections of business establishments." Here, in view of the ease with which hazardous working conditions may often be concealed,^{25/} the effectiveness of the inspection system would be compromised if

^{25/} For example, employers who have permitted ventilating fans designed to remove toxic and flammable substances to become clogged with residues may swiftly restore them to operating condition before allowing them to deteriorate again after inspection. 29 CFR 1910.107. Employers who have allowed employees to work in unshored trenches, 29 CFR 1926.652(a) and (b), or without protective hard hats, safety belts, respirators, ear plugs, or guard rails, 29 CFR 1910.23, 1910.95(b)(1), 1910.132-136; 29 CFR 1926.28(a), 1926.104-105, 1926.500, may quickly require use of such equipment, then rescind or ignore such orders to reduce expenses or increase production. Cf., e.g., I.T.O. Corp. v. OSHRC and Usery, 540 F.2d 543 (C.A. 1, 1976); C. N. Flagg & Co., OSHRC No. 1734, 11 OSAHRC Rep. 632 (1974), affirmed 538 F.2d 308, (C.A. 2, 1976). Guards to prevent amputations (continued)

employers could successfully gain delay by refusing to admit inspectors who do not have warrants, thereby securing the functional equivalent of advance notice. Thus the option for which the Court has repeatedly indicated a preference to avoid heavy burdens on administrators and district courts---seeking warrants only after entry has been refused---is unavailable. Cf. Camara, 387 U.S. at 539-540; See v. Seattle, 387 U.S. at 545-546 and n. 6; Almeida-Sanchez, supra, 413 U.S. at 289 ^{26/} (White, J., dissenting).

(25/continued)

from work with hazardous machines, 29 CFR 1910.212, 217, may be turned off or by-passed by operators when they are sure an inspector will not be present--a common production practice noted in the legislative history. See, e.g., Leg. Hist. 401-402, (Sen. Saxbe). And since proof of correctible violations inter alia requires a showing that workers had access to hazardous machines or areas, e.g., Brennan v. Gilles & Cotting, 504 F.2d 1255, 1263-66 (C.A. 4, 1974), on remand, 1975-76 CCH OSHD Para. 20,448 (1976), successful enforcement proceedings may be blocked with relative ease by temporarily disconnecting machines or barricading areas, if advance notice of inspection is obtained.

26/ The Act's co-sponsor, Representative Steiger, recently addressed this problem. He noted (123 Cong. Record H-163-164 (Daily Ed., Jan. 6, 1977)): "it is of course true that any order restricting OSHA's ability to inspect harms safety and health enforcement, since the right to make unannounced inspections is the cornerstone of the act.***warrantless civil inspections are both absolutely essential to this act's enforcement and a longstanding Federal practice.***And the fact remains that any requirement which would permit employers to turn inspectors away during lengthy warrant proceedings, thus securing time to temporarily conceal or 'clean-up' safety and health hazards, would make this carefully-considered scheme virtually powerless to reach many injurious working conditions. This is especially true because the effect of any employer's insistence on a warrant would rapidly multiply, since his competitors would also be forced to refuse to permit inspections. Otherwise they would be saddled with safety costs their competition could easily evade.***If Congress cannot regulate safety and health without such restrictions, it cannot really regulate at all."

The alternative of routinely obtaining ex parte warrants before attempting inspection would also create substantial difficulties. That procedure would waste both judicial and agency manpower, since most employers willingly consent to inspections without a warrant. Moreover, the Act covers nearly five million workplaces, and the Secretary is currently conducting over 80,000 inspections yearly with only 1,300 inspectors. ^{27/} In these circumstances requiring inspectors to obtain a warrant before each inspection would seriously burden limited judicial and enforcement resources, creating needless delays in implementing inspections to the detriment of the Act's basic purpose of assuring the swiftest possible abatement of occupational hazards. See, e.g., Brennan v. Winters Battery Mfg. Co., supra, 531 F.2d at 322-323; Atlas Roofing Co. v. OSHRC, supra, 430 U.S. at 461.

In any event, pre-inspection warrants for routine "general schedule" inspections at issue here would provide no more safeguards for an employer's privacy interests than the Act and regulations. Since the essence of the general schedule inspection is that it is a random spot check, the factors identified in Camara, supra, 387 U.S. at 538, as supporting a finding of cause for

27/ Congress was well aware that qualified inspectors to enforce this Act would be in critically short supply for an indefinite time. E.g., S. Rep. 91-1282, supra, 12, 21-22, Leg. Hist. 152, 161-162; H.R. Rep. 91-1291, supra, 22-31 Leg. Hist. 852-861; H.R. (Conf.) Rep. 91-1765, 91st Cong., 2d Sess., 37, Leg. Hist. 1190.

administrative inspection would be largely meaningless. ^{28/} Here, as in Biswell, 406 U.S. at 316, "if inspection is to be effective and serve as a credible deterrent, unannounced...inspections are essential. In this context the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible."

3. This case is controlled by the analyses of Colonnade and Biswell, which explained Camara and See and emphatically affirmed warrantless federal inspections under similar regulatory schemes. In Colonnade, 397 U.S. 72 (1970), the Court approved warrantless federal inspections of liquor dealers' premises Congressionally-authorized "during business hours...for the purpose of inspecting...any [required] records or...distilled spirits...kept or stored by such dealers." Id., at 73, n. 1.

28/ A new plant or process may often be more hazardous than an established one; n. 2, supra, the passage of time since the last inspection is not a useful criterion where only a minute percentage of the millions of covered workplaces have ever been inspected; and since general schedule inspections simply establish the Act's presence on a representative statistical basis using programmed computer data, p. 9, supra, there would be no independent questions of fact for a magistrate to resolve.

Probable cause for inspections based on fatality reports or employee complaints could be established by submitting to the magistrate the fatality report prepared by the employer (29 CFR 1904.8) or the employee complaint, which must in any event be presented to the employer at the time of the inspection (29 U.S.C. 657(f)(1)). But the warrant procedure in these cases would provide the employer with no more information concerning the reasonableness of the inspection than he is already provided by statute and regulation. See U.S. ex rel. Terraciano v. Montayne, supra, 493 F.2d at 685.

That case involved a warrantless forcible break-in to a caterer's locked liquor storeroom despite his objection and government agent's ample opportunity to obtain a prior warrant based on particularized cause. 397 U.S. at 72-73; 410 F.2d at 199.

This Court unanimously concluded no warrant was required because this authority was sufficiently narrow to preclude roving searches, regulated dealers "are undoubtedly familiar with the nature and limits of the inspector's authority," and post-refusal warrants would undermine enforcement by eliminating "the element of surprise." 410 F.2d at 200-203. ^{29/} It sustained the forcible break-in because reasonable force is proper to execute a warrant and "the statute here...is the equivalent of a warrant." Id., at 202, 204.

The Supreme Court unanimously agreed warrantless inspection was proper, noting that "Congress has broad authority to fashion standards of reasonableness for [such] searches" and "having prescribed this as a reasonable means of enforcing...tax collection, [there is] no basis for any court to say it cannot be done." 397 U.S. at 76-77 (majority), 79 (Burger, C.J.). That gun violations are easily concealed upon advance warning may be neutralized

^{29/} This Court also indicated that pre-inspection warrants would be unjustifiedly burdensome in light of dealers' limited privacy expectations and the fact that "The constitutionality of statutes authorizing such limited warrantless searches in the public interest is generally recognized,...the additional imposition of warrant procedure would not serve any useful purpose." Id., at 203-204.

by requiring warrants before inspection is attempted; yet the Court never referred to that possibility. And "necessary flexibility" in this context can only mean that because the statute and regulations provide the practicable criterion, magistrates' orders "would simply track [them] and would give the person who was the object of the search nothing more than he already had." Terraciano v. Montanye, supra, 493 F.2d at 685.

4. The Court's subsequent decisions have followed precisely this analysis, whether they concluded that magisterial validation was required due to the institutional chance of abuse under a vague, non-regulatory authorization (G.M. Leasing Corp. v. U.S., supra; cf. U.S. v. Chadwick, 97 S.Ct. 619 (1977) (no authorization)), or that no warrant is needed because relevant privacy interests are either insufficient to invoke warrant procedures or adequately protected by the articulated program at hand. E.g., Martinez-Fuerte, supra; South Dakota v. Opperman, supra. Indeed, G.M. Leasing itself reiterated the validity of warrantless inspections expressly authorized for defined regulatory purposes and contemplating limited "intrusion into petitioner's privacy...based on the nature of its business, its license, or any of its activities," noting that "a business, by its special nature and voluntary existence, may open itself to [warrantless] intrusions that would not be permissible in a purely private context." 97 S.Ct. at 629. It differed only as to the forcible break-in, which the majority found authorized with insufficient clarity. Ibid. Significantly, no opinion referred to the

possibility of requiring advance warrants under this expressly authorized enforcement program. See also U.S. v. Biswell, supra, 406 U.S. at 317 (Blackmun, J.).

Biswell also supports our position. There an eight-Justice majority sustained warrantless searches of gun dealers' store-rooms during business hours under a comprehensive federal gun control act. Unlike those in Colonnade, these searches were not justified by historical practice. This fact did not detain the Court, which tersely noted that warrantless entries were required "if the law is to be properly enforced and inspection made effective," regulated dealers were aware of inspectors' proper authority and could not complain of its exercise, and warrants were only practicable in See because (406 U.S. at 316):

...the mission of [that] inspection system was to discover...violations of the building code...that were relatively difficult to conceal or to correct in a short period of time. Periodic inspection sufficed, and inspection warrants could be required ...[after entry refusals] with little if any threat to the effectiveness of the inspection system there at issue....Here, if inspection is to be effective and serve as a credible deterrent, unannounced even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

It accordingly had "little difficulty in concluding that where ...regulatory inspections further urgent federal interest, and the possibility of abuse and the threat of privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." 406 U.S. at 317.

We submit this decision turned almost entirely on the fact the regulatory scheme itself performed the warrant's essential notice function with respect to assertable privacy interests.

Biswell accordingly validates warrantless OSHA regulatory inspections, Brennan v. Buckeye Industries, 374 F.Supp. 1350 (S.D. Ga. 1974); Dunlop v. Able Contractors (D. Mont., Civ. No. 75-57-BLG, Dec. 15, 1975), affirmed on other grounds, C.A. 9, No. 76-1615; Jan. 10, 1978 (Addendum C) ^{30/} as the District Court agreed (A. 131).

D. Working conditions are "pervasively regulated" for safety and health purposes by this Act in the only meaningful sense under the Amendment

Northwest relies, as have several courts which have reached a contrary result ^{31/}, on a purportedly dispositive distinction between the "historically" or "pervasively" regulated industries in Colonnade and Biswell and the fact OSHA applies to a wide variety of workplaces rather than one particular business or industry. That

30/ Contra, Barlow's v. Usery, 422 F. Supp. 437 (D. Idaho) (three-judge court), stayed sub nom. Marshall v. Barlow's, Inc., 97 S.Ct. 776 (1977), prob. juris. noted, 97 S.Ct. 1642 (1977); Brennan v. Gibson's Products of Plano, 407 F.Supp. 154, 162-163 (D. Tex. 1976) (three-judge court), appeal pending, C.A. 5, No. 76-1526; Dunlop v. Hertzler Enterprises, 418 F.Supp. 627 (D. N.Mex., 1976) (three-judge court), appeal pending, C.A. 10, No. 76-2020; Usery v. Rupp Forge Co. (D. Ohio, No. C-76-385, April 22, 1976), appeal pending, C.A. 6, No. 76-1960; Usery v. Centrif-Air Machine Co., 424 F. Supp. 959 (D.Ga., 1977), appeal pending C.A. 5, No. 77-1511. These cases do not require any different result. They utterly fail to perform the required interest-balancing, pp. 21-24, *supra*; and as demonstrated in Section D, *infra*, they rest on a distinction which is meaningless here.

31/ Cases *supra*, n. 30.

distinction has acquired some currency and should be rejected. The short answer is Colonnade was not engaged in the liquor "industry"; it was a caterer which served liquor as part of a different business. Biswell was not in the gun "industry"; he was a pawnbroker and retailer whose gun business was only part of his operation. What was regulated in each case was not an industry but an activity in which Congress perceived either revenue to be protected or evils to be controlled. An activity is being regulated here, in more detail and with more notice than those under either statute above. That the scope of this regulation is broad supports rather than undercuts Congress' action, for it is commensurate with the pressing evil of life and health the legislature perceived---an evil which "under any system of values would be more important than revenue and suppression of criminal activity." U.S. v. Business Builders, 354 F. Supp. 141, 143 and n. 1 (D. Okla. 1973). That evil's nationwide scope and urgency would seem to call even more strongly for the warrantless inspections Congress declared "essential" to this program. Biswell, 406 U.S. at 316; see U.S. v. Litvin, 353 F. Supp. 1333, 1336 (D.D.C. 1973).

More importantly, the distinction implies Congress lacks power to authorize warrantless inspections for evils which transcend defined industries though all other "reasonableness" standards are met. But Congressional power over interstate commerce is plenary and cannot depend on the fortuities by which American business is structured. Article I itself vests power

by subjects, not industries, and regulation by subject-matter is how Congress has usually proceeded. E.g., Shapiro v. U.S., 335 U.S. 1, 6 n. 4 (1948). Congress declared warrantless civil inspections essential to regulate the easily-concealed job safety and health hazards here; its determination was particularly proper because employers know they "will be subject to effective inspection" of that subject-matter, Biswell, 406 U.S. at 316, as inspectors know workplaces to be inspected contain it. Almeida Sanchez, 413 U.S. at 271.

For these reasons neither a regulatory statute's focus on a particular industry nor the history of pervasiveness of its application have independent Fourth Amendment significance. As the Supreme Court has repeatedly indicated, such factors merely measure the privacy expectations occupants may legitimately entertain. E.g., G.M. Leasing Corp. v. U.S., supra, 97 S.Ct. at 629-630, 631; South Dakota v. Opperman, supra, 428 U.S. at 367-369; Biswell, 406 U.S. at 314-316. See Cady v. Dombrowski, 413 U.S. at 440-442; Almeida-Sanchez, 413 U.S. at 271. The same is true of licenses, which were present in Biswell and Colonnade but counted in those results only as they evidenced regulatees' notice of inspection's lawful authorization and scope. Accord: U.S. v. Litvin, supra; U.S. v. Del Campo Baking Mfg. Co., 345 F. Supp. 1371, 1376-77 (D. Del. 1972). Congress could plainly have required each of the 5 million establishments covered by the Act to be licensed for workplace safety. McDermott v. Wisconsin, 228 U.S. 115, 128 (1912). It understandably decided to

ameliorate this pressing problem by inspection rather than a licensing scheme. See Synthetic Organic Chemical Mfrs. Ass'n. v. Brennan, 506 F.2d 385, 390-391 (C.A. 3, 1974), cert. den. 423 U.S. 830. Nothing in Fourth Amendment reasonableness or Supreme Court precedent requires the propriety of that action to be demonstrated by history or licenses. In light of its clear notice to employers and comprehensive application to the subject regulated, the statute itself is all the "pervasive regulation" required.

In any event American businesses has been thoroughly regulated for job safety and health purposes for generations under such statutes as the Walsh-Healey Act of 1936, 41 U.S.C. 35 et seq., and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq.. In enacting OSHA Congress not only relied heavily on this long history of State and federal workplace regulation, ^{32/} but specifically directed the Secretary to re-issue pre-existing workplace standards without notice or hearing because they had been widely distributed and industry was already familiar with them. 29 U.S.C. 651(9), 653(b)(2), 655(a); Leg. Hist. 145-146, 846-847. Within a year of the Act's effective date the Secretary had issued thousands of standards generally applicable

^{32/} See, e.g., 29 U.S.C. 653(b)(2), 667; S. Rep. 91-1282, supra, at 4, 10-13, 18 Leg. Hist. 144, 150-153, 158; H.R. Rep. 91-1291, supra, at 15, 21, 25 Leg. Hist. 845, 851, 855; id., at 58-59, Leg. Hist. 888-889 (minority views). See also Associated Industries of New York State v. Department, 487 F.2d 342, 351-353 and nn. 11, 13-14 (C.A. 2, 1973).

to industry, e.g., 36 Fed. Reg. 10466 (May 29, 1971), and had been actively enforcing the statute's general duty clause for twelve months. E.g., American Smelting & Refining Co. v. Brennan, 501 F.2d 504 (C.A. 8, 1974); Nat'l. Realty & Const'n. Co. v. OSHRC, supra. To say employers' working conditions are not so pervasively regulated for safety and health purposes as realistically to temper their privacy expectations with respect to areas opened to employees and subject to detailed requirements for those employees' benefit, is to indulge in fiction. As one Court has concluded in affirming warrantless FDA inspections under an analogous regulatory program,

The inspection statute in the case at bar is similar to the Colonnade and Biswell...statutes. Although the defendants in the present case are not licensed, ...[their] business nevertheless is subject to the comprehensive, vigorously enforced regulations of the Food and Drug Administration. This fact, when considered with the extreme importance of these regulations to public health, places the defendants' business within the same category of highly-scrutinized endeavors which justify [such expressly-authorized entries to insure compliance].

U.S. v. Litvin, supra, at 1336. That reasoning applies a fortiori to the more minimal privacy interest in work areas routinely accessible to employees who are the relevant statute's direct beneficiaries.

Northwest argues that only the FAA pervasively regulates the working conditions of its employees for safety and health and therefore that only the FAA may conduct a warrantless inspection (Br. pp. 37-41). But this argument rests on Northwest's misconception of section 4(b)(1). As we show below, infra, pp. 56-57, not all working conditions of an employer are removed from OSHA's authority when another agency exercises authority with respect to safe and healthful working conditions. The test is to examine the working conditions and determine which have been covered by the other agency's exercise of statutory authority; the remaining conditions are regulated under OSHA and, we submit, just as "pervasively regulated" by OSHA as are the exempted working conditions by the sister agency. Nor does section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), grant immunity from inspection by the Secretary to permit him to compare the working conditions existing on the premises with those which the FAA may regulate. As we show below, infra pp. 48-55, the Secretary and the Review Commission have primary jurisdiction to determine whether working conditions or businesses are covered by the Act, and what working conditions are not exempted by section 4(b)(1).

III. IF A WARRANT IS REQUIRED, THE
DECISION BELOW SHOULD BE AFFIRMED

A. The Act should be read constitutionally

Even if the Fourth Amendment precludes these warrantless safety and health inspections of comprehensively regulated work areas, the Court should "under familiar principles of constitutional adjudication" interpret section 8(a) to meet constitutional requirements by inferring an appropriate warrant procedure. Almeida-Sanchez, supra, 413 U.S. at 272. See also Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). That course has consistently been followed by both the Supreme Court, which invalidated neither the ordinances in Camara and See, nor the statute in Almeida-Sanchez, and every district court but Barlow's which has reached this OSHA issue.^{33/} Indeed, the opinions in Camara and See assumed constitutionally-mandated warrants could unquestionably be obtained, inter alia, noting that "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable...standards for conducting an

^{33/} Cases supra, n. 30. Mr. Justice Rehnquist promptly stayed the Barlow's district court injunctive order, pointedly noting that "the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect..." 97 S.Ct. 776.

While it is clear Congress meant to authorize warrantless inspections, it is also clear that interpreting the statute to permit its continued enforcement more closely achieves Congress' intent than effectively eliminating the authority to inspect. 29 U.S.C. 667; cf. Tilton v. Richardson, 403 U.S. 627, 684 (1971). Indeed, the Act's co-sponsor stated that while prompt unannounced inspections were essential to OSHA's enforcement, they were to be carried out "in accordance with applicable constitutional protections." Leg. Hist. 1077 (Rep. Steiger).

area inspection are satisfied" and that "The agency's particular demand for access will, of course, be measured in terms of ... cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement." 387 U.S. at 538-539, 545. The unanimous conclusion of the magistrate and district court that they were not required to nullify section 8(a), but could likewise infer warrant procedure, is unassailable.

B. The warrant was not invalid for failure of the District Court to decide Northwest's claim for exemption under §4(b)(1)

We initially note that Northwest does not attack on appeal the finding of probable cause made by the District Court, and we submit that finding is unassailable since the previous discovery of safety and health violations on Northwest's premises more than satisfies the flexible probable cause requirements set out in Camara and See. Northwest maintains (Br. pp. 48-54) that the warrant could not be validly issued unless the magistrate determined whether OSHA retained under section 4(b)(1) the authority to regulate the working conditions on Northwest's premises. The basis for exemption is Northwest's contention that the FAA exercises statutory authority over working conditions maintained by Northwest and thus displaces OSHA completely. However, the District Court

correctly determined that issue must first be resolved in the appropriate administrative forum since the agencies have primary jurisdiction to determine coverage under the statute and the reach of statutory authority to regulate working conditions. See pp.48-55,infra. It necessarily follows that a magistrate need only be shown that the compliance officer applying for the warrant is duly authorized to conduct inspections under the Act. The administrative resolution of Northwest's 4(b)(1) claim can only be achieved by permitting the inspection which will disclose to the agency the nature of the working conditions so that it can be determined what is regulated by each agency. Simply put, the power to inspect may be implemented even though the results of inspection may disclose circumstances which foreclose the power to cite for violations of this Act. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 210 n. 47 (1946). That is the teaching of Marshall v. Able Contractors, Inc., (C.A. 9, No. 76-1615, Jan. 19, 1978) (Addendum C) and Matter of Restland Memorial Park, 540 F.2d 626 (C.A. 3, 1976) which held that inspections under this Act could not be blocked by a claim that the employer was not in a business "affecting commerce," 29 U.S.C. 652(5), a contention which tests the constitutional authority of Congress to regulate that particular employer. These holdings are

a fortiori here when the employer disputes the statutory authority of OSHA, as opposed to the FAA, to regulate his activities.

C. Northwest must exhaust its administrative remedies

The courts have repeatedly noted that the Act creates a centralized adjudicatory forum -- the Occupational Safety and Health Review Commission -- which is both authorized and specifically designated to pass on all factual and statutory defenses to the Secretary's enforcement action subject to direct appellate review and to "issue an order, based on findings of fact, ... vacating the Secretary's citation or proposed penalty, or directing other appropriate relief" if it finds insufficient grounds therefor. Supra, pp. 5-6 ; see Marshall v. Able Contractors, Inc., (C.A. 9, No. 76-1615, Jan. 10, 1978) (Addendum C); e.g., Matter of Restland Memorial Park, 540 F.2d 626 (C.A. 3, 1976); U.S. Steel Corp. v. OSHRC and Dunlop, 547 F.2d 781 (C.A. 3, 1976); Hartwell Excavating Co. v. Dunlop, 537 F.2d 1071 (C.A. 9, 1976); Madden Const'n. v. Hodgson, 502 F.2d 278 (C.A. 9, 1974). The Commission was created to assure both essential uniformity in results, Brennan v. OSHRC and Gordon Co., 492 F.2d 1027, 1030 (C.A. 2, 1974), and swift self-contained finality in reaching them, e.g., Brennan v. Winters Battery Mfg. Co., 531 F.2d 317, 322-324 (C.A. 6, 1975), cert. den.

425 U.S. 991 (1976). Its authority may not only be invoked by the routine filing of a notice of contest if and when a citation issues, Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1205-06 (C.A. 3, 1974), ^{34/} but clearly includes the power to consider the statutory defense that the citations applied to working conditions as to which another Federal agency exercised safety and health authority. 29 U.S.C. 653(b)(1). This precise fact mandates rejection of Northwest's claim to pre-inspection judicial determination here. As the Third Circuit recently held in - unanimously rejecting an attempt to block enforcement by injecting district court coverage inquiries at the threshold stage,

Whether the [Secretary] is authorized to enter Restland ...depends on whether [it] is an employer "affecting commerce." Restland seeks a determination of that issue prior to permitting entry by the Secretary or his representative. This Court, however, [as was the District Court], is precluded from considering that question at this stage of the proceedings.

* * *

The Review Commission would appear competent to consider the scope of the Act's coverage. If a citation is issued, and if the employer chooses to contest the citation, the Secretary is obliged to serve a formal complaint setting forth, inter alia, the basis for jurisdiction. The Review Commission must then decide whether the agency has exceeded its jurisdiction by attempting to enforce the Act against an employer who does not affect commerce---...such as Restland claims to be. The decision of the Commission would then be subject to review by a Court of Appeals.

^{34/} Aff'd en banc, id., at 1215 (1975), aff'd on another ground, 430 U.S. 442.

* * *

In the ... Act, Congress has delegated to the Secretary ... broad jurisdiction under the interstate commerce clause. Because of the policy considerations underlying the doctrine of exhaustion, we conclude that until Restland has exhausted its administrative remedies, the courts should not consider the question of the Secretary's jurisdiction. If a citation is issued, appealed from, and then upheld by the Review Commission, Restland may, in its petition for review, present to this Court the matter of the Secretary's jurisdiction under the ... commerce clause and the Act [emphasis added].

Restland Memorial Park, supra at 627-28. Accord, Marshall v. Able Contractors, Inc., supra 35/. And in fact the Commission has entertained and disposed of section 4(b)(1) claims in a number of cases. See e.g., Southern Pacific Transportation Co., 1974-75 CCH OSHD ¶19,054 (Rev. Com. 1975), aff'd, 539 F.2d 386 (C.A. 5, 1976), cert. den. 76=1400 (Oct. 3, 1977); Lee Way Motor Freight, Inc., 1976-77 CCH OSHD ¶21, 464 (Rev. Comm. 1977); Mushroom Transportation Co., Inc., 1973-74 CCH OSHD ¶16,881 (Rev. Comm. 1973).

In short, if an when any citation issued as the result of an inspection, Northwest could easily have raised its defense before the Review Commission, which might have obviated any need for judicial consideration of the issue and would certainly have been able to find operative facts in the uniform manner contemplated by the statutory creation of such a centralized body. 29 U.S.C. 660(a); See e.g., DuBois Clubs v. Clark, 389 U.S. 309 (1967); Lance Roofing Co. v.

35/ Cf. Felton Const'n. Co. v. OSHRC, 518 F.2d 49 (C.A. 9, 1975); Keystone Roofing Co. v. OSHRC and Dunlop, 539 F.2d 960 (C.A. 3, 1976); Stockwell Mfg. Co. v. Usery, 536 F.2d 1306, 1308-09 (C.A. 10, 1976).

Hodgson, 343 F.Supp. 685, 687-688 (D. Ga., 1972) (three-judge court), aff'd, 409 U.S. 1070. In these circumstances that objection cannot justify refusing to permit the inspection here.

As Restland clearly indicates, this result is not merely consistent with settled administrative-law principles, but compelled by them. The courts have repeatedly held that where "Congress, as here, specifically designates a forum for ...review of administrative action, that forum is exclusive... And this result does not depend on Congress using the word 'exclusive' in the [particular statutory review provision]." Gardner v. Alabama, 385 F.2d 804, 810-811 (C.A. 5, 1967) cert. denied, 389 U.S. 1046.^{36/} They have held that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative [proceedings] have been exhausted"; litigants must pursue such proceedings "to their appropriate conclusion and...await...their final outcome before seeking judicial intervention"; and the legislature's command "that administrative judgment be taken initially...[means] the courts have no lawful function to anticipate the administrative decision with their own." Macauley v. Waterman S.S. Corp., 327 U.S. 540 (1946); Aircraft and Diesel Corp. v. Hirsch, 331 U.S. 752, 767 (1947). See generally McKart v. U.S., 395 U.S. 185,

^{36/} Accord: Whitney Nat'l. Bank v. Bank of New Orleans, 379 U.S. 411, 422 (1965); Nader v. Volpe, 466 F.2d 261, 266-268 (C.A.D.C., 1972). Cf. 5 U.S.C. 703.

193-195 (1969); Weinberger v. Salfi, 422 U.S. 749, 764-767 (1975). They have further held that a district court defense to administrative action is not maintainable even where the statute is silent regarding the proper forum, if administrative and appellate review affording an adequate remedy is generally provided. See Gardner v. Alabama, supra; J.C. Penny v. Treasury Department, 439 F.2d 63 (C.A. 2, 1971).^{37/} And they have noted that the exhaustion doctrine "exemplifies judicial recognition of the autonomy of the executive branch, whose dominion the courts will not invade unless the agency has clearly exceeded its jurisdiction." Restland, supra, 540 F.2d at 628; see McKart, supra, 395 U.S. at 193-194.

In light of these precedents and the Act's scheme Northwest's proper response to inspection was clear: it should simply have permitted a full inspection under protest, thereby preserving its objections for the Commission and appellate courts if and when a citation actually issued against it. See e.g., Lance Roofing Co. v. Hodgson, supra; Buckeye Industries, 1975-76 CCH OSHD Para. 20, 239 (Rev. Comm. 1975) petition for review pending, C.A. 5, No. 76-1467; Southern Pacific Transportation Co. v. Usery, supra; Southern Railway Co. v. OSHRC, supra. An opposite

^{37/} Cf. Port of Boston v. Rederiak. Transatlantic, 400 U.S. 62 (1972); Sears Roebuck v. NLRB, 433 F.2d 210 (C.A. 6, 1970); Elmo Drive-X v. Dixon, 384 F.2d 342, 344 (C.A.D.C., 1965).

result -- permitting an employer to insist on a full-scale judicial proceeding as a precondition to any inspection --- would license refusing employers to stop statutory enforcement cold by freely and prematurely injecting the courts into the enforcement scheme, despite the availability of an explicit administrative forum which can resolve such issues without prejudicing inspections and delaying initial enforcement. In view of the Act's emphasis on flexible inspections "without delay" and swift issuance of final abatement orders to protect endangered employees, supra, the company's flat refusal to permit entry was legally unjustified, both because it had not been aggrieved by issuance of any citation and because the Act provided a forum in which its contention could be resolved before cognizable "harm" from any subsequently-issued citation occurred. Particularly because this claim for exemption presents the classic question of mixed fact and law which should be decided in the first instance by administering agency, Macauley v. Waterman S.S. Corp., supra,^{38/} Northwest's apparent insistence that the District Court should

^{38/} Accord: Myers v. Bethlehem Corp., 303 U.S. 41, 50-52 (1938) (Brandeis, J.); Newport News Co. v. Shauffler, 303 U.S. 54, 57-58 (1938). See also, e.g., N.L.R.B. v. Reliance Fuel Corp., 371 U.S. 224 (1963). Indeed since the nature of a 4(b)(1) claim requires examination of particular working conditions, no decision can be made without inspection and investigation of the worksite. See pp. 56-57 infra.

substantively have examined coverage cannot prevail. As Justice Brandeis long ago noted (Myers, supra, at 50-51):

So to hold would...substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the [agency] exclusively should hear and determine in the first instance. The contention is at war with the long-settled rule...that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on...where, as here, the contention is made that the administrative body lacked power over the subject matter.

That Northwest has an adequate administrative remedy for its section 4(b)(1) claim is plain, and it should be noted that the District Court imposed the requirement of exhaustion only to that claim and not to the contention that the right of entry was barred by the Fourth Amendment. Northwest continually meshes the two claims that 4(b)(1) and the Fourth Amendment bars the inspection here, but we submit that the authority granted by section 8(a) to inspect workplaces of "employers" "in order to carry out the purposes of this Act," includes the authority to inspect to determine coverage, Oklahoma Press Pub. Co. v. Walling, supra, 327 U.S. at 210 n. 47, and the analysis of Fourth Amendment limitations is no different than when inspection is only for the purpose of discovering violations in undisputedly covered establishments. Therefore, Northwest's right to be free of inspections which violate the Fourth Amendment was accorded appropriate protection and not irremediably breached by denying judicial resolu-

tion of its statutory claim that it is exempt from citation. That question can be and is resolved in litigation before the Review Commission, the centralized administrative forum provided by the statute. The Commission is not bound by the Secretary's determination of coverage, as was the Board of Mine Appeals in Bituminous Coal Operators' Ass'n. v. Secretary of Interior, 547 F.2d 240 (C.A. 4, 1977), nor is there an administrative deadlock which makes resolution of the Commission impossible as was the case in Order of Railway Conductors v. Swan, 329 U.S. 520 (1947).

Lastly, the unanimous holding of three circuits that section 4(b)(1) does not grant an industry-wide exemption, Baltimore and Ohio Rr. Co. v. OSHRC, 548 F.2d 1052 (C.A.D.C., 1976); Southern Pacific Transp. Co. v. Usery, 539 F.2d 386 (C.A. 5, 1976), cert. den., Oct. 3, 1977, No. 76-1400; Southern Ry. Co. v. OSHRC, 539 F.2d 335 (C.A. 4), cert. den. 97 S.Ct. 525 (1976), make it clear that 4(b)(1) claims involve mixed questions of law and fact and not merely statutory interpretation, since what working conditions exist on the premises must be established before it can be determined whether the sister agency has exercised statutory authority so as to displace OSHA. Factual inquiry is necessary as was not the case in Public Utilities Comm. v. United Fuel Gas Co., 317 U.S. 456, 469 (1943).

IV. IN ANY EVENT, NORTHWEST'S CLAIM FOR
EXEMPTION UNDER 4(b)(1) CANNOT BE
SUSTAINED ON THIS RECORD

Northwest argues extensively that the FAA, by issuing regulations which require air carriers to prepare manuals with instructions for the conduct of their operations "with a high degree of safety," 14 CFR 121.131-137, has displaced the FAA's authority over Northwest. Every court which has faced the issue has unanimously rejected similar claims that section 4(b)(1) grants an industry-wide exemption to business regulated in part for occupational safety and health by other Federal agencies. Southern Pacific Transportation Co. v. Uery, supra, 539 F.2d at 390; Baltimore and Ohio RR. Co. v. OSHRC, supra, 548 F.2d at 1054; Southern Ry. Co. v. OSHRC, supra, 539 F.2d at 339. Rather, OSHA standards are displaced only with respect to particular working conditions -- whether in terms of a worker's "surroundings" or the "hazards" encountered -- over which a sister agency has articulated an exercise of authority. Southern Pacific Transportation Co. v. Uery, supra, 539 F.2d at 391-392. While we submit that permitting the affected employers to write their own standards for workplace safety and health does not constitute an exercise of the FAA's statutory authority to do so,^{39/} resolution of

^{39/} Section 4(b)(1) requires an exercise of authority granted to a Federal agency by statute, not the exercise of authority delegated to the very persons subject to regulation.

any 4(b)(1) claim necessarily requires determining the nature of the working conditions on the premises to be inspected. This necessary factual predicate cannot be developed without the very inspection and investigation which Northwest seeks to bar, and self-serving affidavits, which the Secretary cannot counter for lack of the very information an inspection would provide, are not a permissible substitute. This record cannot sustain a claim for exemption under 4(b)(1), nor could any other which was not developed pursuant to discovery and trial procedures. Such procedures are readily available in the adjudicatory administrative forum established by this Act, the Review Commission, and those proceedings have the inestimable advantage of being narrowly focused on the working conditions for which a citation has issued, which is an additional reason why Northwest should be remitted to that forum. The point here is that Northwest's claim in this Court for a 4(b)(1) exemption must be rejected since the record lacks the necessary factual predicate.

CONCLUSION

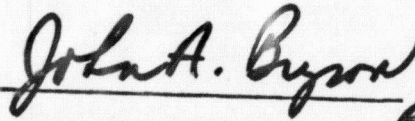
For the reasons set out above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February 1978,
copies of the foregoing brief were served by appropriate
mailing, postage prepaid, on the following counsel of record:

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A D D E N D U M A

REVISED

FIELD PERFORMANCE EVALUATION SYSTEM

FOR INTERNAL OSHA USE ONLY

U. S. Department of Labor
Occupational Safety and Health
Administration

Regional Programs
Office of Field Performance
Evaluations

August 1976

Inspection Programming Guide

1. Purpose: To provide guidelines on inspection scheduling based upon available resources and the amount of inspection attention these industries should receive.
2. General: OSHA's inspection scheduling policy has been based on a priority system which imminent danger, fatality and catastrophic inspections have the highest priority, followed by complaint inspections and general schedule inspections (Regional Programmed Inspections). The above priorities are in accordance with Chapter IV, Field Operational Manual which states the policy.

Regional programmed inspections or general schedule inspections currently (FY 1976) cover each industry to some extent by applying an inspection programming system which is based on BLS injury statistics for each state and by county business patterns. The process for establishing the planned number of general schedule inspections for each industry in a state followed these steps in FY 1976:

- a. The industry (SIC) was rated by a hazard index formed by the product of the BLS recordable injury cases and lost work days.
- b. Then, industry inspection penetration rates were developed which provided graduated frequencies of inspection rates. These rates were related to the hazard indexes, with the highest index SIC receiving proportionately the greatest number of inspections, and the other SIC proportionately fewer inspections.
- c. The number of inspections was then totalled for each state, and scaled downward in accordance with what the compliance staff could be reasonably expected to do in the year. These estimates were reviewed and adjusted by the regional offices in June of 1975, and returned to the national office as their planning goals for the fiscal year beginning July 1, 1975. This system was based on a "coverage" policy which provided some probability of an OSHA inspection in every industry.

Revised programmed inspection strategy has been developed for Fiscal Year 1977 which begins October 1, 1976. These strategies for programmed inspections are as follows:

- a. National Emphasis Program (NEP) for Foundries (See Attachment #1 for more details than summarized below).
- b. Migrant Housing Facilities (See Attachment #2, FIM #76-17).
- c. Worst First Inspection Program Strategy. (See Attachment #3 for more details than summarized below).
- d. Mobile industries.
- e. Hazardous Substance (Health Program) (Lead, Mercury, Silica, etc.)

3. National Emphasis Program for Foundries

The National Emphasis Program (NEP) is an approach to program management, resource allocation, and activity programming which has evolved from our past efforts in special emphasis programs, and which we hope will improve on those earlier programs. The objective is to achieve a closer coordination of a number of ongoing OSHA activities, forming a total program which will address the occupational safety and health profiles of specific industries, with foundries serving as the prototype.

To carry out the NEP as it has been designed, coordination of each activity of the program is vital. Each OSHA Regional Administrator (RA) has assigned a person on his staff the temporary duties of an NEP Coordinator. This person will be responsible to the RA for all aspects of the NEP, for implementing each phase in a timely manner and for monitoring program efforts to ensure that the program is being conducted as planned.

The Standard Industrial Classification codes (SICs) selected for the NEP include all the metal casting industries--die casting establishments as well as ferrous and non-ferrous foundries. However, the specific establishments to be inspected by Region, state and area offices will be provided by the National Office to each Regional NEP coordinator. The NEP Establishment Foundries (Summary) attached, lists the number of establishments to be inspected in each region by state (18(b)) or Federal compliance staff. Specifically for a region's plan, only establishments listed under Federal jurisdiction for inspection will be listed in regional plans. Review attachment for the strategy for NEP inspection, manpower requirements and scheduling, extracted from NEP documents, to assist you in developing the specific numbers for a given region.

*NOTE: Narrative data on the Health Program Strategies is not available yet for inclusion in the manual.

4. Migrant Housing Facilities Inspections

Migrant housing facilities inspections will be targeted inspections during the work season in select areas. The specific number of inspections will be given by the National Office as a guideline to each Region for the work season when employers provide housing as a condition of employment. Review attachment #2 (FIM #76-17) for specific guidelines.

5. Worst-First Program Strategy

For the other industries (SIC's) not selected by other methods for inspection, the selection will be based on a "worst-first" ranking scheme. For each State, industries will be ranked according to the average number of injuries per establishment in that industry. This injury data will be generated from BLS State incidence rates and Unemployment Insurance (UI) employer data. The incidence rates used are State rates calculated at the 4-digit SIC level in manufacturing and 3-digit SIC level elsewhere. For each industry, the expected number of injuries is calculated from the product of the BLS incidence rate and employment and then divided by the number of establishments to produce the average injuries per establishment. The industries are then ranked by this factor. Establishments identified within these industries selected as "worst first" will be extracted from the UI file and a listing of establishment names and addresses will be printed. The length of establishment names, by SIC for general schedule inspections during the current fiscal year can be modified by area offices based upon available risk, past knowledge and/or experience of local conditions by adding and/or deleting establishments.

As a further aid to the field staff, the OSHA/MIS will be used to generate listings of establishments within the "worst-first" SIC categories which have been inspected since July 1972. The listings will summarize all inspection activities and are to be used as a tool for the compliance officers by providing insight into hazards which had been found and standards which were cited in previous inspections. The examples of a model and specification are found in Attachment #3.

6. Mobile Industries

Mobile worksite industries inspections, i.e., construction, longshoring, and logging camps will be programmed and scheduled by local Regional Area Offices based generally on data from Area/Regional/State publications, i.e., F. W. Dodge Reprot.

7. Instructions

a. Regional Inspection Goal:

The Regional Office will establish an inspection goal for the region. In general, this goal will be the portion of the National total which corresponds to the region's portion of total inspection personnel. Contracts 7 (c) (1) and approved 18(b) Plan States in which OSHA enforcement is limited will also be considered.

b. Identification of Inspections Subject to Selection:

Accident and complaint investigations, and follow-ups cannot be planned, therefore should be excluded from Inspection Programming. Each region can determine from historical data and availability of resources the percentage of their inspections which can be scheduled. It is assumed that 50% of all inspections can be programmed and the remaining 50% will be in the areas of accident and complaint investigations and follow-ups. Another reason for excluding complaints, accidents and follow-ups is that these inspections may be less complete than those which are planned, and therefore may not be comparable.

c. Determining the Number of Inspections Per SIC:

The number of inspections programmed by SIC's will be aggregated from the various strategies applicable in each region by area office at whatever SIC level (2-3-4 digit).

8. Review and Approval of Regional Inspection Programming Schedule

The Regional Inspection Programming Schedule becomes a part of the overall Regional Plan which must be submitted to the Associate Assistant Secretary for Regional Programs not later than December 1, 1976, for Fiscal Year 1977. Each Regional Plan with its inspection schedule will be reviewed and approved by the Associate Assistant Secretary for Regional Programs in consultation with the Associate Assistant Secretary for Administrative Programs. Each quarter, each Regional Administrator will have an opportunity to review the Region's plan, determine if the goals are being met and make necessary adjustments to the plan. Such adjustments will be submitted to the Associate Assistant Secretary at the end of the quarter as a part of the overall plan adjustments.

"Worst-First" Program Scheduling Guide

This "Worst-First" Program Scheduling Guide is compiled by the National Office for each OSHA Region and Area Office to provide assistance and guidance to the field staff for scheduling workplaces for general schedule inspections. It is intended to be an effective tool for Regional Directors, Area Directors, and Compliance Officers by furnishing names and addresses of establishments to be inspected and by providing information concerning standards which were cited as the result of a previous inspection.

The "Worst-First" Program Scheduling Guide includes the following:

- (1) A general description of the "worst-first" targeting and scheduling system including a narrative description of the "Worst-First" Industry Ranking list, the Unemployment Insurance Establishment list, and the OSHA/MIS Establishment list.
- (2) Statewide "Worst-First" Industry Ranking list.
- (3) Unemployment Insurance Establishment list for "County of Statewide" (see explanation in Section II.B of the General Description).
- (4) Index of County Locations for "Worst-First" Establishments. A statewide "worst-first" ranked listing of establishment names and county locations obtained from State Unemployment Insurance files. 1/
- (5) Unemployment Insurance Establishment list for each County in an Area Office jurisdiction, including a list of the appropriate counties and county codes arranged alphabetically by county name.
- (6) OSHA/MIS Establishment list for "County of Statewide" (see explanation in Section II.C of the General Description).
- (7) OSHA/MIS Establishment list for each county in the Area Office jurisdiction arranged alphabetically by county name.

1/ Other sources used where State Unemployment Insurance files are not available.

SECTION I

Introduction

The OSHA National Office has refined its method of inspection scheduling through the development of a "worst-first" targeting and scheduling system in an attempt to achieve the following goals:

- More effectively use its compliance resources
- Concentrate inspection activity in establishments (in each state) having the highest number of injuries and lost workdays.

In order to attain these goals, it is evident that OSHA must concentrate its efforts on those industries in each State with the poorest records for occupationally-related injuries, deaths and illnesses. Toward this end, the OSHA National Office will assist the Regional and Area Offices by furnishing state-wide "worst-first" industry ranking reports and establishment identification data reports. These reports will provide a means for compliance officer scheduling and the determination of which firms to inspect.

Step I - "Worst-First" Industry Targeting

The methodology used to develop the Worst-First Inspection Scheduling Reports encompassed the use of individual State Unemployment Insurance (UI) Employer summary data and BLS injury incidence rate data. (Reference Figure 1 - "Worst-First" Inspection Scheduling Reports). Each industry in the state is ranked for inspection scheduling according to the average number of anticipated injuries per establishment in that industry.

Each statewide industry ranking report includes all industries in a state which have a BLS injury rate greater than 10.0 or whose injury rate per

A D D E N D U M B

establishment (hazard rating value) is greater than 10.0.^{2/} A discussion of the output items provided for each State-wide "worst-first" industry ranking report is presented in Section II.A of this document.

Step II - "Worst-First" Inspection Scheduling

Having ranked the industries worst-first within a state, the next step was the generation of a list of establishments to be inspected. Based on the ordering by industry hazardousness determined in Step I, the names and addresses of the establishments in these SIC's were extracted from the UI files. This list of establishments to be inspected is furnished to each Regional and Area Office. It provides them with the schedule of inspections to be carried out and minimizes the requirements for Area Offices to select firms to be inspected within a "worst-first" industry category.

A list of establishments to be inspected is provided for each county and is ranked by "Worst-First" SIC according to the highest number of injuries per establishment. Within each SIC in each County, the list is also ranked according to size of firm with those firms with the greatest number of employees listed first.

In addition to the name and address of each establishment to be inspected, the list also contains employment figures for each firm and injury data for that particular industry (SIC). A discussion of the "Worst-First" establishment list is presented in Section II.B.

As a further aid to the field staff, a listing of establishments within the "Worst-First" SIC categories which have been inspected since July 1972

^{2/} Also eliminated from consideration by the system are MFP SIC's 3321, 3322, 3323, 3351, and 3362 as well as SIC 15, 16, 17, 241, and 416 which cover mobile worksites.

have been generated from the OSHA/MIS. This listing summarizes all "Worst-First" inspection activity previously reported to the MIS and will aid Area Directors and Compliance Officers by providing insight into hazards which had been found and standards which were cited in a previous inspection. A discussion of the data items included in this list of establishments extracted from the OSHA/MIS is presented in Section II.1.

CONFIDENTIALITY OF DATA

The BLS injury rate data and UI employment data are displayed here for administrative purposes only. These data should be deleted from any Public release of this information.

The BLS rate data is calculated as the rate data published by each state with the exception that the final statistical process, that of benchmarking the data to another employment source, is not done. Thus, the rates shown in this document may differ slightly from those published by each state. Also, these rates may reflect the experience of a few establishments and, therefore, not meet publication criteria. Delete all rate data from any Public release of this document and refer to state publication of rates as a source for these data.

The UI employment data is obtained under a confidentiality pledge. Thus, the employment data for two or fewer establishments must be deleted from any Public release of this document. Note that this would include the cumulative employment column completely.

FIELD OPERATIONS MANUAL

which will ensure as wide a range of geographic coverage as possible.

(b) Within those counties selected, at least one large and one small establishment (on basis of employment size) shall be selected from each two-digit SIC code group in the general industry listings. Additional establishments in a two-digit group may be selected as appropriate in approximate proportion to the industry representation in the county. As in the TIP, a number of firms with fewer than 20 employees shall be selected at random from alternate sources of information and scheduled for inspection. As an added factor in establishment selection, Assistant Regional Directors and Area Directors shall design their scheduling procedures to be flexible enough to meet special local problems which will undoubtedly arise as the general inspection program proceeds.

(5) Consultation with trade associations, professional groups and societies, unions, educational institutions and other public groups is encouraged only to the extent of manpower availability. The Area Director shall exercise his management skills and judgment in making decisions regarding allocation of manpower resources in this area.

C. Training.

The curriculum and programs for the training of employers and employees will be formulated, conducted, and controlled by the Associate Assistant Secretary for National Programs. Candidates for training shall be advised of the availability of training courses and be provided with necessary application information.

D. Consultative services.

1. **Purpose and scope.** Consultative services, as distinguished from inspections, are performed by OSHA for educational purposes in order to encourage and assist employers in achieving voluntary compliance. Such services shall consist of educational, technical, and promotional advice given to an employer or to trade associations, professional societies, unions, educational institutions and other public groups.

2. Procedure.

a. An inspection begins when a CSHO enters an establishment; apparent violations must then be cited. Therefore, when a CSHO provides consultative services, such consultation shall not be held at any employer's establishment. If an employer requests consultative services, he shall be told that he can meet with OSHA in the Area or Regional Office.

b. Consultative services to public groups shall be performed on a priority basis established with the approval of the Area Director. Safety and health handouts and promotional materials may be used to help educate employers and employees regarding the Act and the standards and regulations.

E. Security.

1. Personnel security clearances.

a. **General.** Normally field personnel shall not require access to classified data or restricted areas. However, the appropriate U.S. Department of Defense (DOD) or Atomic Energy Commission (AEC) security clearance requirements shall be met by CSHO's and other field personnel having a need for inspection and investigation activities at establishments with DOD and AEC contracts.

b. Clearance procedures.

(1) The Assistant Regional Directors and Area Directors shall select the individual CSHO's who require clearance at each Regional and Area Office for Top Secret, Secret, Confidential and AEC "Q" clearances. These requirements shall be based on the number of defense contract establishments in the areas. As an initial guideline the Regional Office may require: one CSHO with Confidential and one with an AEC "Q" clearance located at the Area Office with the need. The Area Office may require: two CSHO's with "Secret"; and as many "Confidential" clearances as the Area Director considers necessary.

(2) The Area Director shall submit the names of the individuals and the type of

FIELD OPERATIONS MANUAL

(4) When acting on complaints, the CSHO should inspect the entire facility or workplace if time and resources permit, unless there has been a very recent inspection and the CSHO is assured that a total inspection is not necessary. (See Chapter VI.)

c. Target Industry Program (TIP).

(1) To pursue OSHA's goal to deal with the "worst-first" within the resources available to OSHA and because of the need to make an immediate impact on the problems of occupational safety and health, a Target Industry Program (TIP) was developed. In the first year, efforts will be concentrated on the five industries with the highest reported injury-frequency rates. The five industries selected for this year and fiscal year 1972 are:

Industry	SIC	Injury- fre- quency rate	Em- ployees
Longshoring	44-3	69.9	118,000
Lumber and wood products	24	36.1	520,700
Roofing and sheet metal	176	43.0	37,000
Meat and meat products	201	38.5	272,500
Mobile homes and other transportation equipment	379	37.6	74,900

(2) Inspections in States that have 7(c)(1) agreements will be performed by State personnel using OSHA standards, and procedures under the direction of the appropriate Area Directors. However, in addition to investigating complaints and catastrophes/fatalities, OSHA personnel will be needed in these States to perform inspections in the target industries in establishments with fewer than 20 employees (which are not included in the target industry listing) and in longshoring (which is a continuation of the regular maritime program). The "under 20" establishments shall be identified through alternate sources; e.g., yellow pages, State SIC listings, etc.

(3) In the other States and the Territories, Assistant Regional Directors and Area Directors shall schedule target industries inspections of the establishments identified by

the target industry listing. A representative number of TIP establishments with less than 20 employees shall also be identified in the States from alternate sources and inspected. The amount of regional inspection resources needed to carry out the TIP will vary, but shall not exceed 35 percent of that available. All target industries shall be treated as equally important, and inspected as concurrently as feasible with the others. Bureau of Labor Statistics (BLS) is preparing, nationwide, profiles of each TIP which will be forwarded to Assistant Regional Directors as soon as they are available.

d. General inspection and related activities.

(1) Beyond the inspection of catastrophes and/or fatalities, complaints, and the target industries, it is desired to establish OSHA's presence as widely as possible within the framework of available resources.

(2) The general inspection program is designed to provide broad representative inspection coverage of the working conditions of employees in an area. The selection of establishments to be conducted under this program shall be made in accordance with the following factors:

(a) Geographical areas within jurisdiction of Area Office;

(b) Employee population density; and

(c) Available OSHA manpower.

(3) These factors shall be considered in such a manner that employee working conditions in every geographical area within the jurisdiction of the Area Office are inspected in proportion to the density of employees in that area (urban, suburban, rural).

(4) In planning general industry inspection activity, Assistant Regional Directors and Area Directors shall follow these procedures:

(a) Assistant Regional Directors and Area Directors shall select counties within their jurisdictions, taking into account population and establishment concentration,

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 10 1978

F. RAY MARSHALL, Secretary of
Labor, U.S. Department of Labor,

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

Petitioner-Appellee,

No. 76-1615

v.

OPINION

ABLE CONTRACTORS, INC.,

Respondent-Appellant.

Appeal from the United States District Court
for the District of Montana

Before: WRIGHT and CHOY, Circuit Judges, and SWEIGERT,
District Judge.*

PER CURIAM:

Able Contractors (Able) appeals from a district court order compelling it to submit to inspections under the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651, et seq. ^{1/} The Secretary of Labor sought the injunction after Able on several occasions refused inspectors access to its premises and worksites.

The crux of Able's defense was that before inspections under §657(a) can proceed the Secretary must prove that Able is an employer "engaged in a business affecting commerce," [§652(5)] and therefore subject to OSHA's coverage. Able argues that the Secretary must resort to a

* Senior District Judge, for the Northern District of California.

ADDENDUM C

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2 pre-inspection evidentiary hearing, utilizing his §657(b)
3 subpoena powers when statutory coverage is in issue. It is
4 also asserted that Congress would be exceeding its consti-
5 tutional powers to authorize inspections without a prior
6 showing of coverage under the Act.

7 Able's defense is without merit. Requiring such
8 a hearing would totally frustrate OSHA's express objective
9 of establishing a system of inspections executed without
10 undue delay or advance notice. See §§657(a), 666(f). Furthe-
11 more, the Secretary's resort to his §657(b) powers is, by the
12 statute's very terms, discretionary.

13 Moreover, it is hardly a novel proposition that
14 an administrative agency can utilize its investigatory or
15 subpoena powers and that a federal court can grant relief
16 to aid it in doing so without a prior conclusive showing
17 of statutory coverage. See Oklahoma Press Publishing Co. v.
18 Walling, 327 U.S. 186 (1946); Endicott-Johnson Corp. v.
19 Perkins, 317 U.S. 501 (1943); Federal Maritime Comm'n v.
20 Port of Seattle, 521 F.2d 431 (9th Cir. 1975).

21 Generally the agency should make the initial
22 determination of its own jurisdiction. State of Cal. ex rel.
23 Christensen v. F.T.C., 549 F.2d 1321 (9th Cir. 1977).
24 Primary jurisdiction to determine questions of OSHA coverage
25 is lodged in the statutorily created organ for hearing
26 appeals of OSHA violation citations, the Occupational
27 Safety and Health Review Commission. Matter of Restland
28 Memorial Park, 540 F.2d 626 (3rd Cir. 1976). Able should
29 raise the question of statutory coverage in an administrative
30 appeal contesting the validity of any citation it may re-
31 ceive as a result of OSHA inspections.
32

1
2 Before a federal court reviews the question
3 of OSHA jurisdiction, sound judicial policy requires that
4 Able exhaust its administrative remedies. Parisi v.
5 Davidson, 405 U.S. 34 (1972); State of Cal. ex rel.
6 Christensen v. F.T.C., supra; Am. Fed. of Gov't Employees,
7 Local 1668 v. Dunn, 561 F.2d 1310 (9th Cir. 1977). See
8 also Lone Star Cement Corp. v. F.T.C., 339 F.2d 505 (9th
9 Cir. 1964).

10 Application of the exhaustion of remedies doc-
11 trine is appropriate here. Able would not be exposed to
12 irreparable injury by a requirement that it first contest
13 in an administrative forum whether it is within OSHA's
14 reach. There appears to be little doubt about jurisdic-
15 tion,^{2/} and the administrative agency is particularly com-
16 petent to consider the question of statutory coverage. State
17 of California ex rel. Christensen v. F.T.C., supra; Lone
18 Star Cement Corp. v. F.T.C., supra, 339 F.2d at 510 citing
19 3 K. Davis, Administrative Law Treatise § 20.03 (1958 ed.).

20 Able raises for the first time on appeal the
21 issue whether OSHA inspections are searches subject to the
22 reasonableness requirements of the Fourth Amendment.
23 Specifically it argues that the Secretary's inspectors must
24 first obtain a search warrant on probable cause before they
25 can demand access to Able's premises.

26 At no point in the proceedings below was the
27 Fourth Amendment issue raised. Able's sole objection to
28 the inspections, until it drafted its brief for this
29 appeal, was that it had not been proven to be an employer
30 affecting commerce prior to the attempts to compel obedience
31 to the statute. Because it never raised the issue below,
32 we hold that its Fourth Amendment claim was not timely

1
2 asserted and was waived for purposes of this appeal. Usery
3 v. Godfrey Brake & Supply Service, 545 F.2d 52 (8th Cir.
4 1976). Accordingly, we do not address the search and
5 seizure issue.

6 The judgment of the district court is affirmed.

7
8 OFFICE OF THE CLERK
9 UNITED STATES COURT OF APPEALS
10 FOR THE NINTH CIRCUIT
11

12
13 Notice of Entry of Judgment
14

15 Please take notice that the judgment was filed and entered in the case
16 noted on the attached disposition (opinion, memorandum or order). Also,
17 please take special notice of the date of filing as it represents the date
18 of entry of judgment.
19

20 Important Time Periods
21

22 There are fourteen(14) days from the date of entry of judgment in which
23 to file a petition for rehearing. The mandate of the court shall issue
24 twenty-one(21) days after the entry of judgment unless the court orders
25 otherwise. If the court enters an order denying the petition, the mandate
26 will issue(7) days thereafter. For further information regarding these
27 processes, please refer to Rules 36, 40 and 41 of the Federal Rules of
28 Appellate Procedure.
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FOOTNOTES

1/ All references to statutory sections, unless otherwise noted, are to Title 29, United States Code.

2/ We have previously recognized that when Congress enacted OSHA it intended to exercise its commerce clause powers to the fullest extent. Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013, 1015 (9th Cir. 1976).